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IN THE

Supreme Court of the United States

MEDIA GENERAL, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX VOLUME II

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CONTENTS

Document **Page**

VOLUME I

United States Court of Appeals for the Third Circuit

Majority Opinion (June 24, 2004) 1a
Dissenting Opinion 107a

Order Denying Petition for Rehearing
(Sept. 3, 2004) 191a

Order Granting Stay (Sept. 3, 2003) 194a

Order Denying Transfer (Sept. 15, 2003) 197a

VOLUME II

Federal Communications Commission

Report and Order 206a

VOLUME III

Report and Order (continued) 486a
Notice of Proposed Rulemaking 652a

Statement of Chairman Powell 663a

Statement of Commissioner Abernathy 666a

Statement of Commissioner Martin 673a

Dissenting Statement of Commissioner Copps 677a

Dissenting Statement of Commissioner Adelstein 714a

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	MB Docket 02-277
Cross-Ownership of Broadcast Stations and Newspapers	MM Docket 01-235
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	MM Docket 01-317
Definition of Radio Markets	MM Docket 00-244
Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area	MB Docket 03-130

REPORT AND ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: June 2, 2003 **Released:** July 2, 2003

Comments due: 30 days after publication in the Federal Register
Reply Comments due: 45 days after publication in the Federal Register

By the Commission: Chairman Powell, Commissioners Abernathy and Martin issuing separate statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

TABLE OF CONTENTS

[Page] Paragraph

I. INTRODUCTION.....[209a] 1
II. LEGAL FRAMEWORK .....[214a] 10
III. POLICY GOALS.....[219a] 17
A. Diversity .....[219a] 18
B. Competition.....[237a] 53
C. Localism .....[248a] 73
D. Regulatory Certainty .....[251a] 80
IV. MODERN MEDIA MARKETPLACE.....[255a] 86
A. Introduction – The Evolution of Media.....[255a] 86
B. History of the Modern Media Marketplace...[258a] 90
V. LOCAL AND NATIONAL FRAMEWORK .....[288a] 129
VI. LOCAL OWNERSHIP RULES .....[289a] 132
A. Local TV Multiple Ownership Rule.....[289a] 132

B. Local Radio Ownership Rule .....[367a] 235
C. Cross Ownership .....[430a] 327
D. Grandfathering and Transition Procedures .[538a] 482
VII. NATIONAL OWNERSHIP RULES .....[552a] 499
A. National TV Ownership Rule.....[552a] 500
B. Dual Network Rule.....[610a] 592
VIII. MISCELLANEOUS REQUESTS .....[629a] 622
IX. NOTICE OF PROPOSED RULEMAKING .....[648a] 657
X. ADDITIONAL ADMINISTRATIVE MATTERS[655a] 671
XI. ORDERING CLAUSES .....[656a] 674
[Appendices A-I omitted]

I. INTRODUCTION

1. With this Report and Order ("*Order*"), we bring to completion our third biennial ownership review, the most extensive review yet, addressing all six broadcast ownership rules. We address these rules in light of the mandate of Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"), which requires the Commission to reassess and recalibrate its broadcast ownership rules every two years.[1] In the Notice of Proposed Rulemaking in this proceeding ("*Notice*"),[2] we initiated review of four ownership rules: the national television multiple ownership rule;[3] the local television multiple ownership rule;[4] the radio-television cross-ownership rule;[5] and

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104; 110 Stat. 56 (1996).

[2] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, 17 FCC Rcd 18503 (2002) ("*Notice*").

[3] 47 C.F.R. § 73.3555(e) (prohibiting any entity from controlling television stations the audience reach of which exceeds 35% of television households in the United States). For a definition of what constitutes an attributable interest for purposes of applying our multiple ownership rules, *see* notes to 47 C.F.R. § 73.3555.

[4] 47 C.F.R. § 73.3555(b) (allowing the combination of two television stations in the same Designated Market Area ("DMA"), as determined by Nielsen Media Research or any successor entity, provided: (1) the Grade B contours of the stations do not overlap; or (2) (a) at least one of the stations is not among the four highest-ranked stations in the market, and (b) at least eight independently owned and operating full power commercial and noncommercial television stations would remain in that market after the combination).

[5] 47 C.F.R. § 73.3555(c) (allowing common ownership of one or two TV stations and up to six radio stations in any market in which at least twenty independent "voices" would remain post-combination; two TV stations and up to four radio stations in a market in which at least ten independent "voices" would remain post-combination; and one TV and one radio station

the dual network rule.[6] The first two rules have been reviewed and the proceedings remanded to the Commission by the U.S. Court of Appeals for the District of Columbia Circuit.[7] In addition, the Commission previously initiated proceedings on the local radio ownership rule[8] and the newspaper/broadcast cross-ownership rule.[9] Comments filed in those proceedings have been incorporated into this docket along with comments on the rules filed in response to the *Notice*.[10] After we released

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notwithstanding the number of independent "voices" in the market. If permitted under the local radio ownership rules, where an entity may own two commercial TV stations and six commercial radio stations, it may own one commercial TV station and seven commercial radio stations. For this rule, a "voice" includes independently owned and operating same-market, commercial and noncommercial broadcast TV stations, radio stations, independently owned daily newspapers, and cable systems (all cable systems within the DMA are counted as a single voice)).

[6] 47 C.F.R. § 73.658(g) (permitting a television broadcast station to affiliate with a network that maintains more than one broadcast network, unless the dual or multiple networks are created by a combination between ABC, CBS, Fox, or NBC).

[7] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1044 (D.C. Cir. 2002) ("*Fox Television*"), *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002) ("*Fox Television Re-Hearing*") (addressing the national TV ownership rule). *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*") (addressing the local TV ownership rule).

[8] *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001) ("*Local Radio Ownership NPRM*"); *Definition of Radio Markets*, 15 FCC Rcd 25077 (2000) ("*Definition of Radio Markets NPRM*"). The local radio ownership rule limits the number of radio stations that an entity may own in a single market. 47 C.F.R. § 73.3555(a).

[9] *Cross-Ownership of Broadcast Stations and Newspapers*, 16 FCC Rcd 17283 (2001) ("*Newspaper/Broadcast Cross-Ownership NPRM*"). The newspaper/broadcast cross-ownership rule prohibits the common ownership of a daily newspaper and a broadcast station in the same market. 47 C.F.R. § 73.3555(d).

[10] Short references to commenters' names are contained in the list of commenters attached as Appendix A.

the *Notice*, we issued 12 Media Ownership Working Group ("MOWG") studies for public comment.[11]

2. In this *Order* we review the legal context within which this review is conducted, identify and describe the public interest policy goals that guide our decision, assess changes in the media marketplace over time, repeal some rules, modify others, and adopt some new rules. In consideration of the record and our statutory charge, we conclude that neither an absolute prohibition on common ownership of daily newspapers and broadcast outlets in the same market (the "newspaper/broadcast cross-ownership rule") nor a cross-service restriction on common ownership of radio and television outlets in the same market (the "radio-television cross-ownership rule") remains necessary in the public interest. With respect to both of these rules, we find that the ends sought can be achieved with more precision and with greater deference to First Amendment interests through our modified Cross Media Limits ("CML"). We also revise the market definition and the way we count stations for purposes of the local radio rule, revise the local television multiple ownership rule, modify the national television ownership cap, and retain the dual network rule.

3. The changes described herein provide a new, comprehensive framework for broadcast ownership regulation. As described in detail below, Americans today have more media choices, more sources of news and information, and more varied entertainment programming available to them than ever before. A generation ago, only science fiction writers dreamed of satellite-delivered television, cable was little more than a means of delivering broadcast signals to remote

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[11] *FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes Comment Deadlines for 2002 Biennial Regulatory Review of Commission's Ownership Rules*, 17 FCC Rcd 19140 (2002). *See* www.fcc.gov/ownership for the public notice, a summary of the studies, and the studies themselves.

locations, and the seeds of the Internet were just being planted in a Department of Defense project. Today, hundreds of channels of video programming are available in every market in the country and, via the Internet, Americans can access virtually any information, anywhere, on any topic.

4. Nonetheless, while the march of technology has brought to our homes, schools, and places of employment unprecedented access to information and programming, our broadcast ownership rules, like a distant echo from the past, continue to restrict who may hold radio and television licenses as if broadcasters were America's information gatekeepers. Our current rules inadequately account for the competitive presence of cable, ignore the diversity-enhancing value of the Internet, and lack any sound basis for a national audience reach cap. Neither from a policy perspective nor a legal perspective can rules premised on such a flawed foundation be defended as necessary in the public interest. Not surprisingly, therefore, several of the existing rules have been questioned, reversed, and in some cases vacated by the courts. Our current rules are, in short, a patchwork of unenforceable and indefensible restrictions that, while laudable in principle, do not serve the interests they purport to serve.

5. Inaction on our part and the market uncertainty that would result from a perpetuation of the open-ended policy limbo that exists today would ill serve our nation. The adoption of this *Order* is critical, therefore, to the realization of our public interest goals in that it puts an end to any uncertainty regarding the scope and effect of our structural broadcast ownership rules. Most importantly, the rules discussed and described below serve our competition, diversity and localism goals in highly targeted ways and, working together, form a comprehensive framework that is responsive to today's media environment.

6. We adopt herein limits both for local radio and local television station ownership. Both of these rules are premised

on well-established competition theory and are intended to preserve a healthy and robust competition among broadcasters in each service. As explained below, however, because markets defined for competition purposes (*i.e.*, defined in terms of which entities compete with each other in economic terms) are generally more narrow than markets defined for diversity purposes (*i.e.*, defined in terms of which entities compete in the dissemination of ideas), our ownership limits on radio and television ownership also serve our diversity goal. By ensuring that several competitors remain within each of the radio and television services, we also ensure that a number of independent outlets for viewpoint will remain in every local market, thereby protecting diversity. Further, though, because local television and radio ownership limits cannot protect against losses in diversity that might result from combinations of different types of media within a local market, we adopt below a set of specific cross-media limits.

7. Similarly, by virtue of the staff's extensive information gathering efforts and the voluminous record assembled in this rulemaking docket, we have for the first time substantial evidence regarding the localism effects of our national broadcast ownership rules. We can, therefore, with more confidence than ever, establish a reasonable limit on the national station ownership reach of broadcast networks. In addition, under our dual network rule, we continue to prohibit a combination between two of the largest four networks primarily on competition grounds, but the beneficial effects of this restriction also protect localism. In combination, our new national broadcast ownership reach cap and our "dual network" prohibition will ensure that local television stations remain responsive to their local communities.

8. In sum, the modified broadcast ownership structure we adopt today will serve our traditional goals of promoting competition, diversity, and localism in broadcast services. The new rules are not blind to the world around them, but reflective

of it; they are, to borrow from our governing statute, necessary in the public interest.

9. We received more than 500,000 brief comments and form letters from individual citizens. These individual commenters expressed general concerns about the potential consequences of media consolidation, including concerns that such consolidation would result in a significant loss of viewpoint diversity and affect competition. We share the concerns of these commenters that our ownership rules protect our critical diversity and competition goals, as they are designed to do, and we believe that the rules adopted herein serve our public interest goals, take account of and protect the vibrant media marketplace, and comply with our statutory responsibilities and limits. As we make plain in the *Order* below, we have assessed and recalibrated our rules to form a local and national rules framework that promotes diversity, competition and localism, the core concerns of these commenters, and we will address these core concerns in each section of this *Order* as we address each of our ownership rules.

II. LEGAL FRAMEWORK

10. We conduct this biennial ownership review within the framework established by Section 202(h) of the 1996 Act, which provides:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[12]

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[12] 1996 Act, § 202(h).

11. Two aspects of this statutory language are particularly noteworthy. First, as the court recognized in both *Fox Television* and *Sinclair*, "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules."[13] That is, Section 202(h) appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule.[14] Second, Section 202(h) requires the Commission to determine whether its rules remain "necessary in the public interest."[15]

12. As described below, we conclude that in its current form only the dual network rule remains necessary in the public interest as a result of competition. We also conclude that the other ownership rules should be modified as described in this *Order*.

13. *The First Amendment*. The ownership rules we adopt in this proceeding must be consistent not only with the legal standard in Section 202(h), but also with the First Amendment rights of affected media companies and consumers. We conclude, based on the decisions in the *Fox Television* and *Sinclair* cases, that the rational basis standard is the correct First Amendment standard to apply to the broadcast ownership rules.[16] In so doing, we reject, as did the court, the application

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[13] *Fox Television*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 159. Several parties, citing *Fox Television* and *Sinclair*, support the notion that Section 202(h) presumptively favors repeal or modification of the ownership rules. *See, e.g.*, Bonneville Comments at 3; Fox Comments at Exhibit I; Morris Comments at 4; Tribune Comments at 12-13; Fox Reply Comments at 4; NAB Reply Comments at 2-3.

[14] 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfgs. of the United States v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983).

[15] *See 2002 Biennial Regulatory Review*, 18 FCC Rcd 4726, 4730 ¶ 13 (2003).

[16] *Fox Television*, 280 F.3d at 1027; *Sinclair*, 284 F.3d at 148. In the *1998 Biennial Review Report*, the Commission applied the *O'Brien*, or intermediate scrutiny, test to the newspaper/broadcast cross-ownership rule. *1998 Biennial Regulatory Review of the Commission's Broadcast Ownership*

of the intermediate scrutiny ("*O'Brien*") standard[17] applicable to cable operators[18] or the strict scrutiny standard applicable to the print media and to content-based regulations.[19] Under the rational basis standard, the Commission's broadcast regulations

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Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 15 FCC Rcd 11058, 11121-22 ¶¶ 116-18 (2000) ("*1998 Biennial Review Report*") (applying *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*")). Also, in considering the application of the First Amendment to the newspaper/broadcast cross-ownership rule, in the *Newspaper/Broadcast NPRM*, which was released before the *Fox Television* and *Sinclair* cases, we asked about the significance of *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 644 (2001) ("*Time Warner II*"), in which intermediate scrutiny was applied to cable regulations. *Newspaper/Radio Cross-Ownership NPRM*, 16 FCC Rcd at 17296-97 ¶¶ 31-33. The decisions in the *Fox Television* and *Sinclair* cases have settled these issues.

[17] Under *O'Brien*, government regulation of speech will be upheld only if: (1) it furthers an important or substantial governmental interest; (2) the interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377-78; *Turner Broadcasting System v. FCC*, 520 U.S. 180, 185-86 (1997) ("*Turner II*").

[18] In general, ownership limits on cable operators have been subject to the *O'Brien* test. *Time Warner Entertainment Co. v. United States*, 211 F.3d 1313, 1316-22 (D.C. Cir. 2000) ("*Time Warner I*"), *cert. denied*, 121 S. Ct. 1167 (2001); *Satellite Broadcasting & Commun. Ass'n v. FCC*, 275 F.3d 337, 346, 355 (4th Cir. 2001), *cert. denied* 122 S. Ct. 2588 (2002). The Supreme Court has determined that "promoting the widespread dissemination of information from a multiplicity of sources" is a government interest that is not only important, but is of the "highest order" and is unrelated to the suppression of free speech. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662-63 (1984) ("*Turner I*"); *Turner II*, 520 U.S. at 190. On the other hand, the Commission may not burden cable operators' speech with "illimitable restrictions in the name of diversity." *Time Warner II*, 240 F.3d at 1136.

[19] Strict scrutiny First Amendment analysis would require the Commission to demonstrate that its rules are the "least restrictive means available of achieving a compelling state interest." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

satisfy the First Amendment if they are "a reasonable means of promoting the public interest in diversified mass communications."[20] As the court noted in *Sinclair*, there is no unabridgeable First Amendment right to hold a broadcast license; would-be broadcasters must satisfy the public interest by meeting the Commission criteria for licensing, including demonstrating compliance with any applicable ownership limitations.[21]

14. In applying the rational basis test, the *Fox* and *Sinclair* courts relied on longstanding Supreme Court precedent which also supports our decision.[22] In *NCCB*, the Supreme Court applied the rational basis test to the Commission's newspaper/broadcast cross-ownership rules, finding that they "are a reasonable means of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them."[23] The *NCCB* Court explained that the rational basis test is the appropriate standard to govern our broadcast ownership regulations because spectrum scarcity requires "Government allocation and regulation of broadcast frequencies," and because these regulations are not content related.[24] The rational basis standard therefore governs our broadcast ownership regulations, whether they govern those that own only broadcast outlets or those that might seek to combine ownership of a broadcast outlet with a cable system or a newspaper.[25]

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[20] *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802 (1978) ("*NCCB*").

[21] *Sinclair*, 284 F.3d at 168 (citing *NCCB*, 436 U.S. at 795-97).

[22] *NCCB*, 436 U.S. at 802.

[23] *Id.*

[24] *Id.* at 799, 801.

[25] *See id.* at 798-02 (rational basis test applied to newspaper/broadcast rule); *Fox Television*, 280 F.3d at 1045-46 (rational basis test applied to broadcast-cable cross-ownership ban). Several commenters argue that the Commission

15. We disagree with Media General and Tribune, who argue that our ownership rules affecting newspapers should be judged under strict scrutiny First Amendment analysis. Media General and Tribune claim that spectrum scarcity is no longer a valid rationale for media ownership limits and that our diversity and competition goals are inherently content-based.[26] The goals of promoting diversity and localism do not render our ownership rules content-based. As the Supreme Court noted in *NCCB*, the cross-ownership rules at issue were "not content related; moreover, their purpose and effect is to promote free speech, not to restrict it."[27] Furthermore, the courts have considered and consistently rejected the arguments for a stricter standard of First Amendment scrutiny of broadcast regulation made by commenters here.[28] Accordingly, the rational basis test continues to apply to our ownership rules.

16. First Amendment interests are implicated by any regulation of media outlets, including broadcast media. We endeavor to be sensitive to those interests and to minimize the impact of our rules on the right of speakers to disseminate a message.[29] As discussed below, our decision today to eliminate

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is bound by court decisions to apply the rational basis test to First Amendment review of the broadcast ownership rules. UCC Comments at 63-64; UCC Reply Comments at 25-32; Cox Reply Comments at 4.

[26] *See* Media General Comments at 36-37; Media General Reply Comments at 21-24; Tribune Comments at 18-20.

[27] *NCCB*, 436 U.S. at 801; *see also Fox Television*, 280 F.3d at 1046.

[28] *Fox Television*, 280 F.3d at 1046 (quoting *Turner I*, 512 U.S. at 638).

[29] Several parties comment on the First Amendment principles that should guide our broadcast ownership review. *See, e.g.*, CFA Comments at 30-32 (arguing that diversity of media types promotes vibrant civic discourse and comports with the First Amendment); Noam Schechner Comments at 8-13 (stating that the First Amendment requires the Commission to engage in detailed examination of viewpoint diversity); Sandra M. Ortiz Comments at 12 (arguing that safeguarding the First Amendment rights of the public permits restriction of media ownership); Prairie Reply Comments at 2-3 (arguing that the availability of diverse and local information is crucial to the

the newspaper/broadcast cross-ownership rule and the radio-television cross-ownership rule, and to modify our other local ownership rules and our national audience reach cap, turns in part on our determination that these rules in their current form are not a reasonable means to accomplish the public interest purposes to which they are directed. We turn next to identifying the policy goals that will inform this determination.

III. POLICY GOALS

17. In the *Notice*, we sought comment on the policy objectives that should guide our actions in regulating media ownership. We identified diversity, competition, and localism as longstanding goals that would continue to be core agency objectives in this area.[30] We requested comment on how these goals should be defined and measured, and on whether other goals should be added to these three overarching objectives. To fulfill our biennial review obligation, we will first define our goals and the ways we will measure them. We can then assess whether our current broadcast ownership rules are necessary to achieve these goals.

A. Diversity

18. There are five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity. We discuss them in turn.

1. Viewpoint Diversity

19. *Background.* Viewpoint diversity refers to the availability of media content reflecting a variety of perspectives. A diverse and robust marketplace of ideas is the foundation of our democracy.[31] Consequently, "it has long

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spirit of the First Amendment).

[30] *Notice*, 17 FCC Rcd at 18516-27 ¶¶ 33-71.

[31] *See* Richard Brown, *Early American Origins of the Information Age*, A NATION TRANSFORMED BY INFO.: HOW INFORMATION HAS SHAPED U.S. FROM COLONIAL TIMES TO THE PRESENT (Oxford Univ. Press, New York,

been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[32] This policy is given effect, in part, through regulation of broadcast ownership.

20. Because outlet owners select the content to be disseminated, the Commission has traditionally assumed that there is a positive correlation between viewpoints expressed and ownership of an outlet. The Commission has sought, therefore, to diffuse ownership of media outlets among multiple firms in order to diversify the viewpoints available to the public. Prior Commission decisions limiting broadcast ownership concluded that a larger total number of outlet owners increased the probability that their independent content selection decisions would collectively promote a diverse array of media content.[33]

21. The *Notice* sought comment on whether this longstanding presumed link between ownership and viewpoint could be established empirically.[34] The record evidence on this point includes a study by Professor David Pritchard, which

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NY, 2000) at 44-49 *passim* ("Because people widely believed that their republican government required an informed citizenry, they scrambled to make sure that they, and often their neighbors, were properly informed.").

[32] *Turner I*, 512 U.S. at 663-64 (internal quotation marks omitted) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

[33] *See, e.g., Rules and Regulations Relating to Multiple Ownership*, 18 FC.C. 288 (1953) ("[T]he fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints..."); *Amendment of Sections 73.74, 73.240 & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM & Television Broadcast Stations*, 50 F.C.C.2d 1046, 1079-80 (1975) ("*1975 Multiple Ownership Second Report and Order*").

[34] *Notice*, 17 FCC Rcd at 18519-20 ¶ 44.

examined whether ownership affects the viewpoint expressed on commonly-owned television stations and daily newspapers.[35] The study evaluated how ten television-newspaper combinations covered the final weeks of the 2000 presidential election to see whether commonly-owned outlets exhibited common "viewpoints" through their coverage of the election. The two theoretical extremes for the news stories in question were 100 percent pro-Gore and 100 percent pro-Bush. When news coverage on two commonly-owned outlets was sufficiently similar on the continuum between these two points, the study deemed those two outlets to exhibit a common editorial viewpoint.[36] The study concluded that five of the ten television-newspaper combinations exhibited common editorial slants, and that the other five combinations did not. The basis for this conclusion was the "distance" on a continuum between the coverage of the campaign by the television station and the newspaper. Professor Pritchard concluded that "common ownership of a newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary."[37]

22. Some commenters agree. Belo and Media General contend that separating ownership of media outlets to achieve diverse viewpoints is unnecessary for two reasons. First, Belo and Media General assert that their news outlets do not express viewpoints, but provide balanced news coverage in response to consumer preferences.[38] They contend that viewers would reject local newscasts having a perceived bias and would turn to other news sources. Second, both companies explain that

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[35] MOWG Study No. 2, Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign by David Pritchard (Sept. 2002) ("MOWG Study No. 2").

[36] *Id.* at n.15.

[37] *Id.* at 12-13.

[38] Belo Comments, Statement of Robert Dechard at 3; Media General Reply Comments, Statement of J. Stewart Bryan III, at 2.

each outlet under common control has editorial independence and is not subject to top-down news policies from their corporate parents.[39] Declarations submitted by the Chief Executive Officers of Belo and Media General assert that their companies' ability to succeed in the marketplace is directly tied to their objectivity in selecting and reporting news.

23. Others challenge Dr. Pritchard's conclusion. CFA and UCC assert that the Pritchard study is flawed by the absence of a control group of independently-owned newspapers and television stations with which to compare the tested stations.[40] In addition, they reject the study because, they say, the sample size was too small from which to draw inferences. UCC also claims that the study's categorization of a particular news item as "pro-Gore" or "pro-Bush" was subjective and ill-defined.[41]

24. CFA cites two studies in support of its view that ownership affects viewpoint. The first examined newspaper coverage of 60 senatorial campaigns across three election cycles and found that "information on news pages was slanted in favor of the candidates endorsed on the newspaper's editorial pages."[42] The second examined newspaper coverage of Congress's decision to allocate spectrum for digital television by newspaper firms that also owned television stations. According to CFA, newspaper-television firms earning 20 percent or less of their revenue from television uniformly editorialized against the spectrum allocation, while those

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[39] Belo Comments, Dechard Statement at 3-4; Belo Comments, Bryan Statement at 2-3.

[40] CFA Comments at 47 n.68; Center for Economic and Policy Research Comments at 5-6

[41] UCC Comments at 11-12.

[42] CFA Comments at 41 (quoting Kim Fridkin Kahn and Patrick J. Kenny, *The Slant of the News: How Editorial Endorsements Influence Campaign Coverage and Citizens' Views of Candidates*, American Political Science Review, 96 (2002) at 381).

earning more than 20 percent of their revenues from television uniformly editorialized in favor of the allocation.[43]

25. A second way in which ownership may affect viewpoint is self-censorship by journalists and editors. UCC submitted a survey by the Pew Research Center which found that 41 percent of reporters and executives employed by the four broadcast networks said they "purposely avoided newsworthy stories and/or softened the tone of stories to benefit the interests of their news organizations."[44] UCC also refers us to anecdotal evidence that the editorial decisions of the broadcast networks have been affected by their financial interests.[45] Similarly, the Writers Guild suggests that newspaper writers and editors select and write stories, with a bias in favor of satisfying the views of their owner.[46] CFA and UCC also cite studies showing that media companies news decisions are affected by pressure from advertisers.[47]

26. *Discussion.* We adhere to our longstanding determination that the policy of limiting common ownership of multiple media outlets is the most reliable means of promoting viewpoint diversity. Nothing in the record causes us to reconsider this conclusion. The principal record evidence

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[43] *Id.* at 43 (citing James H. Snider and Benjamin I. Page, *Does Media Ownership Affect Media Stands? The Case of the Telecommunications Act of 1996*, paper delivered at the Annual Meeting of the Midwest Political Science Assn. (Apr. 1997).

[44] UCC Comments at 4 (citing Pew Research Center for the People & the Press, *Self Censorship: How Often and Why, Survey Reports* (rel. Apr. 30, 2000) available at www.people-press.org/reports/display.php3?ReportID=39.

[45] Dmitri Williams, *Synergy Bias: Conglomerates and Promotion in the News*, 46 J. OF B'CASTING & ELEC. MEDIA 453 (Sept. 1, 2002).

[46] Writer's Guild Comments at 8-9.

[47] CFA Comments at 44-45 (citing Marion Just, Rosalind Levine and Kathleen Regan, *News for Sale: Half of Stations Report Sponsor Pressure on News Decisions*, COLUM., J. REV. (Project for Excellence in Journalism Nov./Dec. 2001) at 2).

purporting to demonstrate a lack of connection between ownership and viewpoint – the Pritchard study -- contains a significant methodological flaw. The study did not employ a control group to compare with the test set of commonly-owned outlets. The absence of a baseline control group in this study precludes us from placing significant probative value on this study's assessment of ownership and viewpoint.

27. Indeed, the balance of the evidence, although not conclusive, appears to support our conclusion that outlet ownership can be presumed to affect the viewpoints expressed on that outlet. We therefore continue to believe that broadcast ownership limits are necessary to preserve and promote viewpoint diversity. A larger number of independent owners will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners. We believe this proposition, even without the benefit of conclusive empirical evidence, remains sound.[48]

28. Further, owners of media outlets clearly have the ability to affect public discourse, including political and governmental affairs, through their coverage of news and public affairs. Even if our inquiry were to find that media outlets exhibited no apparent "slant" or viewpoint in their news coverage, media outlets possess significant *potential* power in our system of government. We believe sound public policy requires us to assume that power is being, or could be, exercised.

29. We also disagree with Belo and Media General that local ownership restrictions are unnecessary to promote diversity because financial incentives will keep local newscasts unbiased. First, media companies may have multiple financial

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[48] *NCCB*, 436 U.S. at 797 ("[T]he Commission was entitled to rely on its judgment, based on experience, that 'it is unrealistic to expect true diversity from a commonly-owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.'"); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 571 n.16 (1990); *Sinclair*, 284 F.3d at 162.

incentives that drive news decisions, and avoiding an appearance of bias is only one such financial incentive. Record evidence suggests that media companies' handling of the digital spectrum issue was affected by the extent of the company's financial interest in that issue.[49] Second, there may be factors in news coverage decisions that are unaccounted for in the Belo/Media General argument regarding financial incentives. The record contains evidence that reporters and other employees of broadcasting companies alter their news coverage to suit their companies' interests.[50] This suggests that whatever financial interest that media companies may have in presenting unbiased news coverage, those incentives are not the only factors that explain news coverage decisions. Consequently, we cannot agree with Belo and Media General that diverse ownership is wholly unnecessary to ensure diverse perspectives on the news.

30. Lest this finding be misconstrued, we do not pass judgment on the desirability of owners using their outlets for the expression of particular viewpoints. Indeed, we have always proceeded from the assumption that they do so and that our rules should encourage diverse ownership precisely because it is likely to result in the expression of a wide range of diverse and antagonistic viewpoints. We merely observe here that evidence from a variety of researchers and organizations appears to disclose a meaningful connection between the identity of the outlet owner and the content delivered via its outlet(s). This evidence provides an additional basis to reaffirm our longstanding conclusion that regulating ownership is an appropriate means to promote viewpoint diversity.

31. Our conclusion also should not be read to suggest that each and every incremental increase in the number of different outlet owners can be justified as necessary in the public

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[49] Williams, *supra* note 45.

[50] *See supra*, note 44.

interest. To the contrary, there certainly are points of diminishing returns in incremental increases in diversity.[51] Moreover, such increases may, in some instances, harm the public interest in localism and competition.[52] The balancing of these interests we address in the sections below dealing with individual rules.

32. *Measuring Viewpoint Diversity.* Viewpoint diversity is a paramount objective of this Commission because the free flow of ideas under-girds and sustains our system of government. Although all content in visual and aural media have the potential to express viewpoints, we find that viewpoint diversity is most easily measured through news and public affairs programming. Not only is news programming more easily measured than other types of content containing viewpoints, but it relates most directly to the Commission's core policy objective of facilitating robust democratic discourse in the media. Accordingly, we have sought in this proceeding to measure how certain ownership structures affect news output.

33. Nonetheless, we agree with Fox and CFA that content other than traditional newscasts also contributes to a diversity of viewpoints.[53] Television shows such as *60 Minutes*, *Dateline NBC*, and other newsmagazine programs routinely address matters of public concern. In addition, as Fox points out, entertainment programming such as *Will & Grace*, *Ellen*, *The Cosby Show*, and *All in the Family* all involved characters and storylines that addressed racial and sexual stereotypes. In so doing, they contributed to a national dialogue on important social issues.

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[51] *Time Warner II*, 240 F.3d at 1135 (questioning the point at which a marginal increase in diversity no longer qualifies as an "important" governmental interest).

[52] *See, e.g.*, Cross-Ownership Section VI(C)(1)(b), *infra*, regarding the localism benefits of relaxing the newspaper-broadcast cross-ownership ban.

[53] CFA Comments at 27-28; Fox Comments at 8-9.

34. Although we agree that entertainment programs can contribute to our goal of viewpoint diversity, we will focus on the news component of viewpoint diversity where the record permits us to do so. Our objective of promoting program diversity in this proceeding subsumes the viewpoint diversity contained within entertainment programming. We address our policy goal of program diversity in the following subsection.

35. Finally, we conclude that the diversity of viewpoints by national media on national issues is greater than that regarding local issues. This is principally due to the vast array of national news sources available on the Internet, cable television and DBS.[54]

2. Program Diversity

36. We conclude that program diversity is a policy goal of broadcast ownership regulation. Program diversity refers to a variety of programming formats and content. With respect to television, this includes dramas, situation comedies, reality shows, and newsmagazines, as well as targeted programming channels such as food, health, music, travel, and sports. With respect to radio, program diversity would be reflected in a variety of music formats such as jazz, rock, and classical as well as all-sports and all-news formats. Programming aimed at various minority and ethnic groups is an important component of program diversity for both television and radio.

37. In general, we find that program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation. The rules adopted in this proceeding will ensure competition in the delivered video and radio programming markets. Programming is an input to the retail product offered by competing delivery systems. As long as the broadcast markets remain competitive, we expect program diversity to be best achieved by relying on media companies responding to consumer preferences. Delivery

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[54] See Appendix B, National News Sources.

systems compete fiercely for consumer attention and have powerful financial incentives to tailor their program offerings to serve consumers' diverse demands for programming.

3. Outlet Diversity

38. In the *Notice*, we requested comment on the definition of "outlet diversity" and whether it should be a goal of media ownership policy. Outlet diversity simply means that, in a given market, there are multiple independently-owned firms. The question is whether diversification of outlet ownership *by itself* is a policy goal. We have previously found that outlet diversity has not been viewed as an end in itself, but a means through which we seek to achieve our goal of viewpoint diversity.[55] As we have explained, "the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."[56]

39. We find that independent ownership of outlets by multiple entities in a market contributes to our goal of promoting viewpoint. Regulating the ownership of outlets to achieve those goals is far preferable to attempting to engineer outcomes directly, because ownership regulation reduces the need for the Commission to make subjective judgments about program content.

40. However, our review of the record persuades us that outlet diversity within radio broadcasting continues to be an important aspect of the public interest that we should seek to promote. We are committed to establishing a regulatory

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[55] *Notice*, 17 FCC Rcd at 18517 ¶ 36; *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1723, 1724 ¶ 7 (1989) ("*1989 Multiple Ownership Report and Order*").

[56] *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476, 1477 ¶ 3 (1964) ("*1964 Media Ownership Report and Order*").

framework that promotes innovation in the field of broadcasting. Innovation is not just a matter of preserving a "magic number" of independent owners in a market. Such a scheme would ignore the fact that the most potent sources of innovation often arise not from incumbents but from new entrants.[57] We seek therefore to establish a regulatory regime that preserves opportunities for new entry into the broadcast industry. Although our interest in promoting new entry extends to all broadcasting, that interest is greatest in radio broadcasting. Radio remains one of the most affordable means by which a potential new entrant can enter the media business.[58] Radio thus is a likely foothold through which a new entrant can gain the experience necessary to operate and grow a successful media enterprise.

41. Finally, we believe that one benefit of outlet diversity is the promotion of public safety. The rules we adopt to promote competition, diversity, and localism also will serve the public interest by ensuring that multiple owners control the broadcasting outlets in any market. In an emergency, the separation of broadcast facilities and personnel among multiple independent broadcast companies in a given market will avoid any possibility that the failure of one broadcast company to transmit critical public safety information will not leave that area without other broadcast owners to perform that service.

4. Source Diversity

42. "Source diversity" refers to the availability of media content from a variety of content producers. The *Notice* explained that source diversity can contribute to our "retail"

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[57] *See, e.g., 1998 Biennial Regulatory Review – Testing New Technology*, 14 FCC Rcd 6065, 6077 ¶ 28 (1999).

[58] A review of radio station sales in the past 16 years shows that the average sale price of a radio station is $5.74 million dollars versus $43.14 million dollars for a television station. *See: BIA State of the Industry Television Reports*, various years.

goals of viewpoint diversity and program diversity.[59] Past Commission efforts to regulate source diversity centered on broadcast television. The Prime Time Access Rule (PTAR) and the Financial Interest and Syndication (Fin-Syn) rules limited vertical integration between program producers and broadcast television networks.[60] The Commission eliminated those regulations when it could not justify them in light of media marketplace changes.[61]

43. The record before us does not support a conclusion that source diversity should be an objective of our broadcast ownership policies. The Center for Creative Community (CCC), the Coalition for Program Diversity (CPD), and the Writers' Guild of America (WGA) contend that source diversity is lacking on prime time broadcast television today, and therefore that the Commission should require the largest networks to purchase a portion of their prime time programming from unaffiliated program producers.[62] In support of its recommendation, CPD contends that in 1993, 68% of prime time programming on the three largest broadcast

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[59] *Notice*, 17 FCC Rcd at 18517-18 ¶ 37.

[60] PTAR forbade local stations carrying the programming of ABC, CBS, and NBC in the top 50 markets from offering more than three hours of prime time network programming Monday through Saturday. The Commission hoped that the hour vacated by the networks would encourage non-network production of quality prime time programming. The Fin-Syn rules prohibited the then-dominant television networks from obtaining a financial interest in independently-produced programming and from syndicating any program domestically. *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 23 F.C.C.2d 382 (1970).

[61] *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043(7th Cir. 1992) (remanding the Commission's decision to retain modified financial interest and syndication rules); *In re Review of the Syndication and Financial Interest Rules*, 10 FCC Rcd 12165 (1995) (eliminating the fin-syn rules).

[62] CPD Comments at 3; CCC Comments at 7; WGA comments at 3.

networks was independently produced versus 24% today.[63] This decrease in independently-produced prime time programming, CPD argues, establishes that source diversity is rapidly declining and its revitalization should be the principal goal of this rulemaking.[64]

44. When prime time television viewing was dominated by three broadcast networks, the Commission elected to require broadcast networks to purchase prime time programming from unaffiliated producers in order to encourage diversity on television. In light of dramatic changes in the television market, including the significant increase in the number of channels available to most households today, we find no basis in the record to conclude that government regulation is necessary to promote source diversity.

45. In 1979, the vast majority of households had six or fewer local television stations to choose from, three of which were typically affiliated with a broadcast network.[65] Today the average U.S. household receives seven broadcast television networks and an average of 102 channels per home.[66] Commenters recommending that the Commission adopt source diversity as a goal offer no evidence of the quantity of programming sources across the delivered video programming market (*i.e.* both broadcast and non-broadcast channels) and why that quantity is deficient. Given the explosion of programming channels now available in the vast majority of homes today, and in the absence of evidence to the contrary, we

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[63] CPD Comments at 4-5.

[64] CPD Comments at i.

[65] Michael L. Katz, *Old Rules and New Rivals: An Examination of Broadcast Television Regulation and Competition* at 38 (Sept. 1999).

[66] 2002 Video Competition Report: Opening Statement of David F. Poltrack, Executive Vice President, CBS Television, Before the Forum on Media Ownership Rules, Col. U. Law School, New York, NY (Jan. 16, 2003).

cannot conclude that source diversity should be a policy goal of our broadcast ownership rules .

5. Minority and Female Ownership Diversity

46. Encouraging minority and female ownership historically has been an important Commission objective,[67] and we reaffirm that goal here. In 1995, the Commission issued a Notice of Proposed Rulemaking to "explore ways to provide minorities and women with greater opportunities to enter the mass media industry."[68] Thereafter, in 1996, the Commission issued a

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[67] *See, e.g., Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978) (articulating policies to increase the level of broadcast facility ownership by minorities, including the comparative hearing minority preference, distress sale, and tax certificate policies); *see also Amendment of Section 73.3555 (formerly sections 73.35, 73.240 and 73.636) of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 74, 97 (1985) *("1985 Multiple Ownership MO&O")* (enabling: (1) persons acquiring "cognizable interests" in minority owned and controlled broadcast stations to own 14 of each AM, FM, and television stations (instead of the standard numerical cap of 12 each); and (2) a television station owner to reach a maximum of 30% of the national audience (instead of the standard 25% cap) provided that at least 5% of the aggregate reach of its stations is contributed by minority controlled stations).

[68] *See Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 10 FCC Rcd 2788 (1995). In its subsequent 1998 Report and Order, the Commission amended FCC Form 323, Annual Ownership Report, to include race and gender data of parties with attributable interests in commercial broadcast licenses, thereby enabling the Commission to "determine accurately the current state of minority and female ownership of broadcast facilities, to determine the need for measures designed to promote ownership by minorities and women, to chart the success of any such measures that we may adopt, and to fulfill our statutory mandate under Section 257 of the 1996 Act and Section 309(j) of the Communications Act of 1934 to promote opportunities for small businesses and businesses owned by women and minorities in the broadcasting industry." *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 13 FCC Rcd 23056, 23095 (1998). *See* 47 U.S.C. § 309(j)(3)(B) (requiring the Commission, in designing systems of competitive bidding for broadcast licenses, to

Notice of Inquiry seeking comments on the nature of market entry barriers for small businesses.[69] In addition, the Commission held public forums to identify barriers to competition and to formulate strategies to overcome them.[70]

"promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including . . . businesses owned by members of minority groups and women").

[69] *See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 11 FCC Rcd 6280 (1996); *see also Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, 12 FCC Rcd 16802 (1997). The Commission, in a separate proceeding, tentatively concluded that it should take steps to further its "longstanding goal of increasing minority ownership of broadcast stations" and sought comment on what competitive bidding tools could be used to achieve this goal, and the goal of increased female ownership. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 12 FCC Rcd 22363, 22399-401 (1997). In its First Report and Order following this NPRM, the Commission noted that it had commenced a series of studies to examine the market entry barriers encountered by minorities and women, and would wait for review of, and public comment on, these studies prior to determining competitive bidding rules affecting minorities and women. As an interim measure, the Commission adopted a "new entrant" bidding credit. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 13 FCC Rcd 15920, 15994-95 (1998).

[70] *See Forum on Small Business Market Entry Barriers*, FCC Public Notice 64975 (rel. Sept. 5, 1996). In 2000, the Commission released five studies regarding the market entry barriers faced by minorities, women, and small businesses in the communications industry. *See FCC Chairman Kennard and Commissioner Tristani to Host Policy Forum on Market Entry Barriers Faced by Small, Women- and Minority-Owned Businesses on Tuesday, December 12, 2000*, 16 FCC Rcd 3772 (2000). We believe additional

47. We have received comments advocating various policies to enhance minority and female ownership of broadcast companies.[71] NABOB recommends that we should maintain our current ownership rules; use Arbitron markets to define radio markets; give greater consideration to the promotion of viewpoint diversity and minority ownership when we review assignment of license and transfer of control applications; eliminate our policy of granting temporary waivers of our multiple ownership rules (which allow merging broadcasters 6-24 months to come into compliance with the rules); adopt a bright-line test to limit radio ownership consolidation; and urge Congress to reinstate the minority tax certificate policy.[72]

48. IPI argues that maintenance of broadcast ownership caps will best serve the distinct programming preferences of minority groups.[73] AWRT asks us to include the goal of increasing the number of female-owned broadcast businesses as we consider changes to our broadcast ownership rules.[74] UCC urges the Commission to "explicitly advance through its ownership rules" the policy goal of promoting broadcast ownership opportunities for women, minorities and small businesses.[75]

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evidence is necessary, however, before we reach conclusions on these important issues. We note that MMTC asks that we include in this record and seek comment on these five studies. We take official notice of the 2000 market entry barrier studies, as they were publicly released and are available on our web site, so it is unnecessary to include them in the record.

[71] *See, e.g.*, MMTC/NABOB Motion for Further Extension of Time, filed Dec. 9, 2002 at 4-5 (asking the Commission to affirm that minority ownership is a central interest in ownership proceedings).

[72] NABOB Comments at 3-4, 17-25; NABOB Reply Comments at i-ii, 2-5, 9-11.

[73] IPI Comments at 58.

[74] AWRT Comments at 5-7.

[75] UCC Comments at 17-19. UCC also asks that we reject NAB's proposal for a more relaxed television duopoly rule waiver standard, arguing that more easily-obtained waivers would undermine opportunities for new market

49. MMTC proposes business and regulatory initiatives that "would go a long way toward increasing entry into the communications industry by minorities."[76] MMTC's initiatives include: (1) equity for specific and contemplated future acquisitions; (2) enhanced outreach and access to debt financing by major financial institutions; (3) investments in institutions specializing in minority and small business financing; (4) cash and in-kind assistance to programs that train future minority media owners; (5) creation of a business planning center that would work one-on-one with minority entrepreneurs as they develop business plans and strategies, seek financing, and pursue acquisitions; (6) executive loans, and engineers on loan, to minority owned companies and applicants; (7) enhanced access to broadcast transactions through sellers undertaking early solicitations of qualified minority new entrants and affording them the same opportunities to perform early due diligence as the sellers afford to established non-minority owned companies; (8) nondiscrimination provisions in advertising sales contracts; (9) incubation and mentoring of future minority owners; (10) enactment of tax deferral legislation designed to foster minority ownership; (11) examination of how to promote minority ownership as an integral part of all FCC general media rulemaking proceedings; and (12) ongoing longitudinal research on minority ownership trends, conducted by the FCC, NTIA, or both[77]; (13) sales to certain minority or small businesses as alternatives to divestitures.

50. These comments contain many creative proposals to advance minority and female ownership. Clearly, a more thorough exploration of these issues, which will allow us to craft specifically tailored rules that will withstand judicial

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entrants, including women and minorities. UCC Reply Comments at 23-25.

[76] MMTC Nov. 5, 2002 Comments at Tab 10, "Twelve Minority Ownership Solutions."

[77] *Id.*

scrutiny, is warranted.[78] Therefore, we will issue a Notice of Proposed Rulemaking to address these issues and incorporate comments on these issues received in this proceeding into that proceeding.

51. We see significant immediate merit in MMTC's proposal regarding the transfer of media properties that collectively exceed our radio ownership cap. MMTC recommends that the Commission generally forbid the wholesale transfer of media outlets that exceed our ownership rules except where the purchaser qualifies as a "socially and economically disadvantaged business (SDB)."[79] As discussed in the Grandfathering and Transition Procedures, Section VI(D) *infra*, we agree with MMTC that a limited exception to a "no transfer" policy for above-cap combinations would serve the public interest. We agree with MMTC that the benefits to competition and diversity of a limited exception allowing entities to sell above-cap combinations to eligible small entities, which we define below, outweigh the potential harms of allowing the above-cap combination to remain intact. Greater participation in communications markets by small businesses, including those owned by minorities and women, has the potential to strengthen competition and diversity in those markets. It will expand the pool of potential competitors in media markets and should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets.

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[78] *See Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 227 (1995) (holding that all racial classifications imposed by a governmental agency must be analyzed by reviewing courts under strict scrutiny, and are constitutional "only if they are narrowly tailored measures that further compelling governmental interests").

[79] MMTC Comments at 107. *See also* NAB Reply Comments at 44 ("Although NAB would go further, so that station owners would be allowed to transfer properly formed station combinations freely to any purchaser, whether an SDB or not, NAB does not oppose MMTC's proposal.").

52. In addition, MMTC proposes that we adopt an "equal transactional opportunity" rule similar in some respects to our EEO requirements.[80] While such a rule is worthy of further exploration, we decline to adopt a rule without further consideration of its efficacy as well as any direct or inadvertent effects on the value and alienability of broadcast licenses. We see merit in encouraging transparency in dealmaking and transaction brokerage, consistent with business realities. We also reiterate that discriminatory actions in this, and any other context, is contrary to the public interest. For these reasons, we intend to refer the question of how best to ensure that interested buyers are aware of broadcast properties for sale to the Advisory Committee on Diversity for further inquiry and will carefully review any recommendations this Committee may proffer. As soon as the Commission receives authorization to form this committee we will ask it to make consideration of this issue among its top priorities.[81]

B. Competition

53. In this section, we define our objectives with respect to media competition and we address arguments that we should not pursue competition as a public interest objective and instead defer all competition concerns to the antitrust authorities, *i.e.*, the Department of Justice or the Federal Trade Commission.[82]

54. Since the beginning of the federal government's regulation of broadcast spectrum, it has been a basic tenet of the communications policy that "there be competition in the

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[80] MMTC Comments at 115-120.

[81] We anticipate that the Committee will make recommendations on ways to improve our regulatory programs designed to enhance new entry into broadcasting.

[82] Fox Comments at 57-59; NAB Comments in MM Docket No. 01-317 at 28-30; Viacom Comments at 53, 67-69; WVRC Comments in MM Docket No. 00-244 at 18; Cox Comments in Docket No. 00-244 at 15-16; Entercom Comments in Docket No. 00-244 at 3.

radio broadcasting industry."[83] For that reason, the Communications Act prohibits us from "grant[ing] a monopoly in the field of broadcasting,"[84] and we are directed instead to serve the "public interest" by "assur[ing] fair opportunity for open competition in the use of broadcasting facilities."[85] From its inception, the Commission has adhered closely to that mandate and sought to ensure that transfers and assignments of station licenses remain consistent with the policy of free competition embodied in the Communications Act.[86]

55. The 1996 Act reinforces the link between competitive markets and the public interest. One of the central aims of the 1996 Act was to introduce competition to communications industries that traditionally have been thought of as "natural monopolies."[87] As the preamble to the 1996 Act makes manifest, Congress believed that greater competition and reduced regulation would "secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[88] Thus, the 1996 Act embodies a philosophy – new to telecommunications, but well-established in broadcasting – that competition is the most

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[83] *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (1950).

[84] *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-76 (1940).

[85] *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956); *see also FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940) ("Congress moved under the spur of a widespread fear that in absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.").

[86] *See Genesee Radio Corp.*, 5 F.C.C. 183, 186-87 (1938).

[87] *See Sanders Bros.*, 309 U.S. at 474-75.

[88] 1996 Act Preamble, 110 Stat. 56; *see also* Joint Explanatory Statement at 113 (1996 Act "provide[s] for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

effective means of producing the marketplace results that best serve the public interest.

56. We thus see nothing in the 1996 Act that signifies a retreat from our deep and abiding interest in promoting and preserving competition in broadcasting. Indeed, by directing us to determine whether our ownership rules are "necessary in the public interest *as a result of competition*," we believe Congress charged us to implement policies that create opportunities for greater competition – both among broadcasters and between broadcasters and other outlets – that would lessen the need for prescriptive ownership regulations. Regardless of whether we conclude in a particular context that maintaining, modifying, or repealing one of our ownership rules best advances our interest in competition, it is clear that competition is a policy that is intimately tied to our public interest responsibilities and one that we have a statutory obligation to pursue. As recently as last year, the Court of Appeals for the District of Columbia reaffirmed this point when it stated: "[t]o the extent Sinclair maintains that consideration of competition is beyond the proper purview of the Commission, it is simply wrong."[89]

57. We hereby affirm our longstanding commitment to promoting competition by ensuring pro-competitive market structures. Consumers receive more choice, lower prices, and more innovative services in competitive markets than they do in markets where one or more firms exercises market power.[90] These benefits of competition can be achieved when regulators accurately identify market structures that will permit vigorous competition.

58. In limiting broadcast ownership to promote economic competition, we also take major strides toward protecting and

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[89] *Sinclair*, 284 F.3d 148 (citing *NCCB*, 436 U.S. at 795).

[90] See F.M. Scherer and David Ross, INDUS. MKT STRUCTURE AND ECON. PERFORMANCE (3rd Ed.) at 19-28 (Houghton Mifflin Co., Boston MA, 1990).

promoting our separate policy goal of protecting competition in the marketplace of ideas -- viewpoint diversity. This is because antitrust theory has at its core an objective that is similar to this agency's goal of promoting viewpoint diversity: both public policy objectives share a common belief that the aggregation of inordinate market share by a small number of firms will tend to harm public welfare; both are built on the notion that highly concentrated markets tilt the proper balance of power too far in favor of some firms and against those who would challenge them.[91]

59. In this proceeding, Fox argues that because economic markets are narrower than idea markets, we should eliminate our broadcast ownership rules. Fox contends that antitrust enforcement will prevent mergers on economic competition grounds before markets would become unreasonably concentrated on diversity grounds.[92] Although our own analysis of the record does not support Fox's view in all cases, we take this opportunity to underscore that in many markets, the record evidence does show that our competition-based ownership limits (*i.e.* the caps on local radio and local television ownership) more than adequately protect viewpoint diversity in a large number of markets despite being based on standard antitrust principles. For example, as explained below, we adopt rules allowing television combinations subject to the proviso that one company may not combine two of the top four-rated stations in a local market.[93] This rule is grounded in economic competition analysis, but it also has the effect of separating ownership of those local television stations most

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[91] Because of this common theoretical underpinning between competition policy and viewpoint diversity policy, some have advocated in favor of expanding antitrust regulation to include protecting competition in the marketplace of ideas. *See* Maurice E. Stucke and Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L. J. 249 (2001).

[92] Fox Comments at 26-29.

[93] *See* Local TV Ownership Rule, Section VI(A), *infra*.

likely to be significant contributors to local viewpoint diversity through the production of local news and public affairs programming. Nonetheless, contrary to Fox's contention, our analysis of the record leads us to conclude that preserving competitive markets will not, in all cases, adequately protect viewpoint diversity. As discussed in the Cross-Media Limits section below, we find that certain combinations in smaller markets would unreasonably threaten viewpoint diversity even if they would not, under standard antitrust theory, result in competitive harms.

60. *Measurement of competition.* Historically we have relied on assessments of competition in advertising markets as a proxy for consumer welfare in media markets.[94] We found that competition among broadcast outlets was likely to benefit consumers by making available programming that meets the programming preferences of consumers. In our 2001 decision modifying the dual network rule, however, we suggested that the changing nature of electronic media markets – particularly the direct payment by a majority of consumers for delivered video programming – might cause us to revisit our traditional focus on advertising markets as the appropriate means of measuring competition in connection with our broadcast ownership limits.[95]

61. Although advertising markets continue to be a reasonable basis on which to evaluate competition among

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[94] *Amendment to § 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and TV Broadcast Stations*, 100 F.C.C.2d 17 (1984) ("*1984 Multiple Ownership Report and Order*"); *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387 (1992) ("*1992 Radio Ownership Order*"); *Review of the Commission's Regulations Governing TV Broadcasting, TV Satellite Stations Review of Policy & Rules*, 14 FCC Rcd 12903 (1999) ("Local TV Ownership Report and Order"); *clarified in Memorandum Opinion & Second Order on Reconsideration*, 16 FCC Rcd 1067 (2001)("Local TV Ownership Recon Order").

[95] *Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule*, 16 FCC Rcd 11114 (2001).

media companies, in this *Order* we will rely more heavily on other metrics. We do so because changing business models affect the nature of competition in the relevant economic markets. In the past, television stations generally faced economic competition from other television stations, and radio stations from other radio stations. The television and radio markets relied principally on advertising revenues to fund their businesses. Today, the financial models for the television and radio businesses are changing. A large portion of the revenue in the television business now consists of direct payments by consumers. Eighty-five percent of American households subscribe to television programming supplied by multichannel video programming service from delivery systems (MVPDs) – cable television and direct broadcast satellite -- to watch television.[96] MVPDs, in turn, typically pay non-broadcast programming networks, such as ESPN, CNN, and MTV, for the right to deliver those channels to subscribers. The payments received by program networks represent one source of their revenue. Non-broadcast programming networks also however, sell advertising time on their channels. Thus, in competing with broadcasters, non-broadcast programming networks typically have two income streams to develop or purchase programming. Broadcasters continue to rely overwhelmingly on advertising revenue.[97]

62. We also find that the subscription model of cable television and DBS offer an additional competitive advantage over advertising-only broadcast television stations. Broadcast

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[96] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 26901, 26975 (2002) ("*2002 Video Competition Report*").

[97] For example, the cable industry received $15.5 billion in advertising revenues and $35.5 billion in subscriber payments for video programming in 2001. By contrast, the broadcast television industry received $38.9 billion in advertising revenue. (Universal McCann, U.S. Advertising Vol. (March 2003)) Kagan World Media, *Broadband Cable Financial Databook 2002* (2002) at 10-11.

stations are limited in their ability to maximize consumer welfare because broadcast programming is a public good.[98] Local television stations have thus far been unable to capture and profit from viewers' relative intensity of preference for certain programming. That is, the advertising-based business model for broadcast stations does not differentiate between programming that viewers value highly and programming that is viewed, but valued less.[99] As long as viewers are watching a broadcast show, they are "sold" to advertisers at a particular rate irrespective of the intensity of their preference for that show.

63. The business model of cable television and DBS, by contrast, permits non-broadcast channels to extract direct payments from viewers based partly on viewers' strength of preference for different programming. MVPDs accomplish this by tiering groups of specialized video channels and by selling certain other highly valued channels on a channel-by-channel basis. The vast majority of MVPD viewers purchase the "basic" tier of MVPD service that includes both general interest channels and special interest channels. MVPDs also offer highly desired, niche-oriented, channels as part of separate tiers and certain others as stand-alone premium channels. Viewers that highly value either purchase them as part of a tier of channels or on a stand-alone basis. This ability of non-broadcast channels to charge viewers for their programming, along with selling advertising on that programming, allows certain non-broadcast channels to segment the viewing market through tiered or premium

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[98] A public good is a good whose consumption does not preclude consumption of the same good by other consumers. Andrew Mas-Colell, Michel D. Whinston, and Jerry R. Green, MICROECONOMIC THEORY (Oxford Univ. Press 1995) at 359-64.

[99] For a discussion of the effects of the public good nature of broadcast television and the issues faced by broadcasters and regulators, see Thomas G. Krattenmaker and Lucas A. Powe, Jr., REGULATING B'CAST PROGRAMMING (MIT Press and AEI Press, 1995) at 40-43.

offerings, thereby capturing and profiting from viewers' intensity of preference in a way that broadcast stations, through an advertising-based business model, cannot.

64. We agree with broadcasters who contend that the MVPD business model, with two revenue streams, has become a competitive dynamic for which our competitive analysis should account.[100] Therefore, in analyzing markets comprised of both free over-the-air broadcasters as well as subscription delivery systems, we will look to audience share as one metric for assessing the state of competition, which we find to be a more accurate gauge of competition in these circumstances. We will not discard advertising market analysis where appropriate, but we limit its reliance to discrete markets where we believe the foregoing analysis is inapplicable. This includes our analysis of the dual network rule and the national television ownership cap and in determining whether different media platforms should be regarded as economic substitutes. For those purposes, we will continue to look to advertising market shares as one consideration, where that is an appropriate gauge of competition, in determining whether opportunities for media properties to earn revenue may be put at risk absent some structural regulation.

65. To the extent we rely on other competitive metrics, we note that the antitrust authorities generally focus their inquiry on price competition, and their primary concern is in ensuring economic efficiency through the operation of a competitive market structure. Although related, the Commission's public interest inquiry has a different focus. As our predecessor, the Federal Radio Commission put it, "[t]he emphasis must be first and foremost on the interest, the convenience, and the necessity of the . . . public, and not on the interest, convenience, or

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[100] Victor B. Miller, Christopher H. Ensley, Tracy B. Young, *Television Industry Summit 2002: Leveling the Playing Field. The Case for Deregulation*, Bear Stearns (Jan. 2003) at 51-64, 168-69, 184.

necessity of the individual broadcaster, or the advertiser."[101] Thus, in evaluating our interest in preserving competitive broadcast markets, we will consider the ultimate effect that a diminution in competition would have on the consuming public.

66. There is no serious dispute that, if consumers uniformly paid a subscription fee to all television and radio stations to access programming, we would have an interest in ensuring competition in broadcasting.[102] One reason for our interest is that competition works to constrain prices to efficient levels, making access to programming services more affordable and therefore more available to a greater number of Americans.[103] Here, of course, radio and television programming is a public good, supported by advertising revenues and available without charge to everyone with the proper equipment. But it does not follow from the public good nature of broadcast television and radio that our competition concerns are any less important in this area.

67. Although lower prices are an important benefit of competitive markets, we have repeatedly emphasized that competition also is the wellspring of greater innovation and improvements in the quality of service.[104] Thus, although the public does not pay a subscription fee to receive over-the-air broadcast signals, we continue to have a public interest responsibility, distinct from our diversity and localism goals, to ensure that broadcasting markets remain competitive so that all the benefits of competition – including more innovation and improved service – are made available to the public.

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[101] Fed. Radio Comm'n, Second Ann. Rpt. 169-70 (1928) (quoting in *Pottsville Broadcasting*, 309 U.S. at 138 n.2).

[102] *See, e.g., Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.* (Hearing Designation Order), 17 FCC Rcd 20559, 20603 (2002) ("*EchoStar/DirecTV HDO*").

[103] *See, e.g.*, id. at 20603 ¶ 97. *See also* 47 U.S.C. § 151.

[104] *See, e.g.*, id. at 20559 ¶ 176.

68. Therefore, we conclude that our duty as an agency runs to consumers, not advertisers. In many cases, competitive market structures specifically designed to protect consumers also will protect advertisers, and vice versa. Nonetheless, in setting our local television and local radio ownership caps, we will rely, where possible, on measures other than shares of advertising markets in order to reflect the decreasing relevance of advertising market shares as a barometer of competition.

69. *Innovation.* In the *Notice* we sought comment on whether innovation should be an objective of our broadcast ownership policies.[105] The Information Policy Institute (IPI) contends that we should consider the effects of different market structures on innovation incentives.[106] IPI states that innovation theory premised on the need for scale does not automatically justify relaxed broadcast ownership limits because large firms are most likely to innovate only if they face sufficient competitive pressure. With respect to media markets generally, IPI argues that relaxed ownership regulations are unlikely to increase innovation in media markets because, according to IPI, the affected industries are mature.[107] NAB/NASA also implies that innovation is a relevant policy objective in its arguments that the existing national television cap preserves independently-owned groups of affiliates that a proven record of programming and technological innovation.[108]

70. We agree with IPI and NAB/NASA that innovation should be a policy objective of our broadcast ownership regulations. Consumers benefit from competitive markets in multiple ways, including lower prices, greater choice of sellers, and innovative products and services. Where a market such as broadcasting is characterized by a significant degree of non-

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[105] *Notice*, 17 FCC Rcd at 18525-26 ¶ 68.

[106] IPI Comments at 50.

[107] *Id.* at 52.

[108] NAB/NASA Reply Comments at 23-27.

price competition, it may be particularly important for us to focus on how our ownership rules affect innovation incentives. Innovation may be less measurable in the short term than other attributes of media market, such as price, total output, and number of firms in the market, but over longer periods of time, may represent a critical driver of consumer welfare.

71. The transition from analog to digital services by broadcasters represents a potentially significant enhancement to consumer welfare. Digital transmission of video and audio programming by television and radio stations may facilitate new services for consumers by permitting more efficient bandwidth utilization. With respect to local televisions stations, this additional bandwidth could be used to transmit high-definition programming; to transmit one or more additional program streams; or to deliver entirely new services.[109] NAB/NASA has argued that local television ownership structures are very likely to affect stations' ability to proceed with the ongoing digital transition. NAB contends that the fixed costs associated with digital television equipment upgrades fall disproportionately on stations in smaller markets and that station combinations will speed the transition.[110] In addition, the introduction of digital transmission by radio stations may permit greater competition and innovation in radio markets by facilitating improved signal quality and by permitting stations to deliver data along with audio to users' receivers.

72. In sum, we conclude that the Commission should seek to promote innovation through its broadcast ownership limits. Consumer welfare is likely to be enhanced when, all else being equal, the Commission permits broadcast market structures that encourage innovation. We agree with IPI, however, that

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[109] *See, e.g.*, NAB/NASA Comments at 26-27 (23 companies owning television stations formed iBlast to "explore, research, and develop new business relationships and new uses for the digital spectrum").

[110] NAB Comments at 71-72.

multiple factors influence the pace of innovation, only one of which is market structure.[111] We will therefore make ownership decisions that promote innovation in media markets based principally on evidence that particular market structures or firm characteristics tend to encourage innovation.

C. Localism

73. In the *Notice*, we sought comment on the extent to which localism should continue to be a policy goal in our regulation of broadcast ownership. We agree with NAB/NASA that localism continues to be an important policy objective. Localism is rooted in Congressional directives to this Commission and has been affirmed as a valid regulatory objective many times by the courts. We hereby reaffirm our commitment to promoting localism in the broadcast media.

74. Federal regulation of broadcasting has historically placed significant emphasis on ensuring that local television and radio stations are responsive to the needs and interests of their local communities. In the Communications Act of 1934, Congress directed the Commission to "make such distribution of licenses, frequencies, hours of operation, and power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."[112] In the earliest government regulation of radio, the Commission embraced localism. In the Federal Radio Commission's 1927 Report to Congress, it wrote: "The Commission found it possible to reassign the allocated stations to frequencies which would serve as many communities as possible to ensure those communities had at least one station that would serve as a basis for the development of good broadcasting to all sections of the country.... New York and

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[111] IPI Comments at 48 ("[T]he relationship of market structure, R&D spending, and technological progress . . . involves a myriad of ill-understood and understudied complex interactions.").

[112] 47 U.S.C. § 307(b).

Chicago stations were not allowed to dominate the situation."[113]

75. When the Commission created the Table of Allotments in 1952 pursuant to the Communications Act, localism was the organizing principle of the plan. In announcing the allotments, the Commission explained that dispersed allotments "protect[] the interests of the public residing in smaller cities and rural areas more adequately than any other system."[114] In the legislative history of the 1996 Act, Congress strongly reaffirmed the importance of localism: "Localism is an expensive value. We believe it is a vitally important value, however [and] should be preserved and enhanced as we reform our laws for the next century."[115]

76. The courts too have long viewed localism as an important public interest objective of broadcast regulation. In *NBC v. United States*, the Supreme Court wrote: "Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community."[116] Last year the D.C. Circuit affirmed the legitimacy of Commission regulation to preserve localism, stating: "[T]he public interest has historically embraced diversity (as well as localism) . . . and nothing in § 202(h) signals a departure from that historic scope."[117]

77. *Measurement of localism.* We remain firmly committed to the policy of promoting localism among broadcast outlets. Today we seek to promote localism to the greatest extent possible through market structures that take advantage of media

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[113] SECOND ANNUAL REPORT OF THE FEDERAL RADIO COMMISSION TO THE CONGRESS OF THE UNITED STATES FOR THE YEAR ENDED JUNE 30 (1928) at 8-9.

[114] *Sixth Report and Order*, 17 Fed. Reg. 3905 (1952).

[115] H. Rep. No. 104-104 (1996) at 221.

[116] *NBC v. United States*, 319 U.S. 190, 203 (1943).

[117] *Fox Television*, 280 F.3d at 1042.

companies' incentives to serve local communities. In addition, we seek to identify characteristics of those broadcasters that have demonstrated effective service to individual local communities and to encourage their entry into markets currently prohibited by our existing rules.

78. To measure localism in broadcasting markets, we will rely on two measures: the selection of programming responsive to local needs and interests, and local news quantity and quality. The Commission decided long ago that local station licensees have a responsibility to air programming that is suited to the tastes and needs of their community and that the station licensee, not a network or any other party, must decide what programming will best serve those needs.[118] Program selection, then, is a means by which local stations respond to local community interests, and we will use it as one measure of localism.

79. A second measure of localism is the quantity and quality of local news and public affairs programming. Commenters have argued that news and public affairs goes to the core of the Commission's policy objectives.[119] We agree that the airing of local news and public affairs programming by local television stations can serve as a useful measure of a station's effectiveness in serving the needs of its community. Our decision to consider local news attributes in our decisions is consistent with our 1984 evaluation of the national television cap. In that decision we analyzed record evidence regarding the amount and quality of local news produced by owners of different-sized television station groups.[120] As discussed below, this measure of service to local markets is relevant to

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[118] *See Deregulation of Radio*, 84 F.C.C.2d 968, 981 (citing *En Banc Programming Inquiry Statement*, 44 F.C.C. 2303, 2314 (1960)).

[119] CFA Comments at 29 ("The primary purpose of ownership rules should be to ensure a diverse, antagonistic marketplace for news and information – not entertainment.").

[120] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 37-38.

our consideration of both the national television cap and our local broadcast rules.

D. Regulatory Certainty

80. After defining our policy goals of diversity, competition and localism, we must determine the particular regulatory framework that would best achieve these goals. In the *Notice* and in the *Local Radio Ownership NPRM* we sought comment on whether to adopt a pure case-by-case analysis or bright line rules.[121] Based on the record and our own experience administering structural ownership rules, we conclude that the adoption of bright line rules, on balance, continues to play a valuable role in implementing the Commission's goals. We have also decided to retain our existing framework of targeted, outlet-specific, multiple ownership rules, that cover the various media and perceived areas of potential competition and diversity concerns rather than adopting a single rule to cover all media.[122]

81. The Commission is required to examine any proposed transfer of a broadcast license and must affirmatively find that the transfer is in the public interest. In the context of broadcast transactions, the Commission's analysis is simplified by the extensive body of structural rules we adopt herein. Thus, the extensive rulemaking proceeding used to develop these broadcast ownership rules takes full account of the Commission's public policy goals of diversity, competition, and localism. These rules squarely embody the Commission's

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[121] *Notice*, 17 FCC Rcd at 18538-39 ¶¶ 106-111; *Local Radio Ownership NPRM*, 16 FCC Rcd at 19886-87 ¶¶ 57-60.

[122] In the *Notice*, we asked whether we should adopt a single rule, instead of outlet-specific rules, in order to assure consistency. We also asked whether such a rule could be focused on promoting viewpoint diversity and whether it might apply to cable systems. 17 FCC Rcd at 18538-39. CWA proposes that if we relax our local TV ownership rules, we should adopt a single, unified rule to cover all local media markets. CWA Comments at 46-48. Our new Cross Media Limits are targeted to viewpoint diversity, but, as discussed below, it does not encompass cable systems.

public interest goals of limiting the effect of market power and promoting localism and viewpoint diversity.

82. As we stated in the *Notice*, bright line rules and case-by-case analysis both offer different advantages and disadvantages associated with predictability of outcome, administrative costs, flexibility in administering our rules, and application processing time. Many parties favor bright line rules and oppose case-by case analysis because bright line rules provide certainty to outcomes, conserve resources, reduce administrative delays, lower transaction costs, increase transparency of our process, and ensure consistency in decisions.[123] We believe that these factors weigh in favor of the bright line rule approach. Commenters who support adopting case-by-case instead of structural rules in the context of the local television ownership rule and radio/television ownership rule, argue that blind adherence to structural limits would not adequately reflect the true nature of a market, and that competition in local markets would be sufficiently safeguarded by case-by-case analysis.[124] As discussed below, we have taken into consideration the nature of markets and our responsibility to ensuring a competitive marketplace in designing the structural rules.

83. Other commenters oppose case-by-case analysis, particularly in the context of radio transactions. These commenters argue that the current case-by-case approach adopted in the interim policy has brought more uncertainty, administrative delays, greater transaction costs to the application process, and has invited abuse by competitors.[125]

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[123] NAB Comments at 48-49; Bonneville Comments at 8; NAB Comments in MM Docket No. 01-317 at 47, 48-49; Eure Comments in MM Docket No. 01-317 at 5; HBC Comments in MM Docket No. 01-317 at 13; MMTC Comments in MM Docket No. 01-317 at 49.

[124] Buckley Comments at 1, 5; Paxson Comments at 29-30, Pappas Comments at 14-15.

[125] NAB Comments in MM Docket No. 01-317 at 47; NABC Comments in

Moreover, UCC claims that the current approach has failed to protect against unreasonable consolidation in the radio industry.[126] A case-by-case approach also makes business planning difficult on the industry side and is resource-intensive for the Commission, raising regulatory costs. We agree with the majority of commenters that favor bright line rules. The bright line rules we establish in this *Order* will protect diversity, competition, and localism while providing greater regulatory certainty for the affected companies than would a case-by-case review. Any benefit to precision of a case-by-case review is outweighed, in our view, by the harm caused by a lack of regulatory certainty to the affected firms and to the capital markets that fund the growth and innovation in the media industry. Companies seeking to enter or exit the media market or seeking to grow larger or smaller will all benefit from clear rules in making business plans and investment decisions. Clear structural rules permit planning of financial transactions, ease application processing, and minimize regulatory costs.[127]

84. We recognize that bright line rules preclude a certain amount of flexibility. A case-by-case analysis would allow the Commission to reach decisions by taking into account particular circumstances of every case. For instance, bright line rules may be over-inclusive, by preventing transactions that would result in increased efficiencies, or under-inclusive, by

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MM Docket No. 01-317 at 17; UCC Comments in MM Docket No. 01-317 at 24; Clear Channel Comments in MM Docket No. 01-317 at 25, n.81; Cumulus Comments in MM Docket No. 01-317 at 23; Idaho Wireless Comments in MM Docket No. 01-317 at 7; Mapleton Comments in MM Docket No. 01-317 at 7; MBC Comments in MM Docket No. 01-317 at 10.

[126] UCC Comments in MM Docket No. 01-317 at 20.

[127] *Cf. Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, 14 FCC Rcd 12559, 12581-82 ¶¶ 43-44 (1999) ("*1999 Attribution Report and Order*") *on. recon.*, 16 FCC Rcd 1097 (2001).

allowing transactions that would raise concerns, if the circumstances of the case were reviewed. However, our experience with the current case-by-case analysis used for radio transactions leads us to believe that this approach in the area of media ownership is fraught with administrative problems. Currently, any radio transaction that proposes a radio station combination that would provide one station group with a 50% share of the advertising revenue in the local radio market, or the two station groups with a 70% advertising revenue, undergoes additional public interest analysis. For each of these transactions, the staff conducts an individual competitive analysis and may request additional information from the parties if it is necessary in order to reach a decision on a particular transaction. The administrative time and resources required for such an undertaking are considerable. Moreover, such an approach hinders business planning and industry investment for all radio firms falling within the ambit of our case-by-case review. We are not persuaded that this approach is necessary in order to administer our ownership rules effectively. Indeed, we eliminated the cross-interest policy in 1999, having held that the regulatory costs and chilling effects of that case-by-case approach to broadcast transactions, overlaid on top of our structural rules, and the benefits of applying a clear and discernable standard outweighed any risks of potential abuses in eliminating the policy.[128]

85. The bright line rules adopted today have been developed based upon our review of the media marketplace and our assessment of what ownership limits are necessary in order to promote our goals in applying ownership rules. We are confident that the modified rules will reduce the chances of precluding transactions that are in the public interest or, alternatively, permitting transactions that are not in the public interest.[129] In addition, we have discretion to review particular

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[128] *Id.* at 12609-12611 ¶¶ 112-16.

[129] Our decision is not inconsistent with our decision to modify the CMRS

cases, and we are obligated to give a hard look both to waiver requests,[130] where a bright line ownership limit would proscribe a particular transaction, as well as petitions to deny.[131]

IV. MODERN MEDIA MARKETPLACE

A. Introduction – The Evolution of Media

86. Today's media marketplace is characterized by abundance. The public is better informed, better connected, and better entertained than they were just a decade ago. Traditional modes of media (e.g., newspapers, television, radio) have greatly evolved since the Commission first adopted media ownership rules in 1941,132 and new modes of media have

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Spectrum Cap rule. *See 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd 22668 (2001). There, the Commission moved from prophylactic spectrum limits to a case-by-case approach, finding that in light of the growth of both competition and consumer demand in the CMRS market, spectrum caps were no longer necessary. *Id.* at 22693. There, we determined that structural rules were no longer necessary because of the competitive nature of the marketplace, and that the current spectrum caps were interfering with the marketplace's creation of incentives regarding choice of technology. Our basis for choosing to move to a case-by-case analysis in that context, simply does not apply in the context of broadcast rules.

[130] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (setting out criteria for waivers of Commission rules); *See also* 47 C.F.R. § 1.3.

[131] *See* 47 U.S.C.§ 309(d). A petition must contain specific allegations of fact sufficient to show that (1) the petitioner is a party in interest, (2) a grant of the application would be prima facie inconsistent with the public interest, and (3) a substantial and material question is presented to be determined by the Commission. *Sanders Bros*, 309 U.S. at 477; *Maumee Valley Broadcasting, Inc.*, 12 FCC Rcd 3487, 3488-89 (1997), *as modified by, CHET-5 Broadcasting, L.P.*, 14 FCC Rcd 13041 (1999); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394-95 (D.C. Cir. 1985); *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1409-10 (D.C. Cir. 1996).

[132] In 1941, based on the findings of the Chain Broadcasting Report, the Commission promulgated the first of its broadcast ownership rules restricting the development and commercial business practices of the broadcast radio networks. The Chain Broadcasting Report found that the radio networks had behaved in a manner that was contrary to the competition

transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history. Today we can access news, information, and entertainment in many enhanced and non-traditional ways via: cable and satellite television, digital transmission, personal and portable recording and playback devices, handheld wireless devices, and perhaps the most extraordinary communications development, the Internet. In short, the number of outlets for national and local news, information, and entertainment is large and growing.133

87. Such abundance in the media was not always available, however. The modern media marketplace is dramatically different from the media world of sixty years ago.134 In fact, the modern media marketplace is far different than just a decade ago. Ten years ago the world wide web was still nascent and was used primarily by technology enthusiasts. "Digital" was a term largely used to describe the abstract world of zeros and ones; DVD players had not yet hit the commercial market; and satellite television was available only via analog C-Band dishes that were almost eight feet in diameter. Cable television was also an analog transmission, resulting in 87% of cable systems offering fewer than 53 channels.135 Video programming was available 24-hours a day, seven days a week, but there were far fewer choices for news and entertainment than there are today.136

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and diversity goals defined by the Federal Radio Commission. *Report on Chain Broadcasting, Commission Order No. 37*, Docket No. 5060 (May 1941).

133 *See e.g.*, NAB Comments at 10; *see* Appendix B.

134 Fox Comments at i.

135 *Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)*, 9 FCC Rcd 7442, 7567 (1994) ("*1994 Video Competition Report*") (23% of cable systems offered fewer than 30 channels of programming).

136 Today, there are more than 308 non-broadcast networks available for

88. This digital migration is having an effect on today's youth in a way that television had on the "baby boom" generation of the early fifties, and radio had on the youth of the Depression. Today's high school seniors are the first generation of Americans to have grown up with this extraordinary level of abundance in today's media marketplace. At home and at school, the majority of teens have access to cable television and high speed Internet access.137 At home, many teens have access to as many as 100 to 200 channels of video programming.138 The current generation of teens has always lived with 24-hour national and regional news networks, local television stations, and cable news channels,139 and thus have come to expect immediate and continuous access to news, information, and entertainment. Their world has never been different.

89. Section 202(h) requires the Commission to consider whether any of its broadcast ownership rules are "necessary in the public interest as a *result of competition*." This *Order*

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carriage by cable systems, whereas in 1993, there were only 106 non-broadcast programming services available for carriage. *See 2002 Video Competition Report*, 17 FCC Rcd at 26907; *1994 Video Competition Report*, 9 FCC Rcd at 7522, 7589-92.

[137] Approximately 81,000 public and private schools are served by cable in the classroom, reaching 78% of K-12 students. In 2001, approximately 99% of public schools had Internet access, and about 85% of public schools had high-speed Internet access. Cable in the Classroom, *Overview*, at http://www.ciconline.com/PressRoom/PressKit/ TheOrganization/overview (visited May 5, 2003); National Center for Education Statistics, *Internet Access in U.S. Public Schools and Classrooms: 1994-2001*, at http://nces.ed.gov/pubs2002/internet/3.asp (visited May 5, 2003).

[138] DBS provides as many as 200 channels of video programming. Many cable systems also currently offer a digital tier of service which, in many cases, provides subscribers with a total of more than 100 channels of video programming. OPP Working Paper No. 37, Broadcast Television: Survivor in a Sea of Competition by Jonathan Levy, Marcelino Ford-Livene, and Anne Levine (Sept. 2002) at 43, 48, 54 ("OPP Working Paper No. 37").

[139] CST Comments at 4.

confronts that challenge by determining the appropriate regulatory framework for broadcast ownership in a world characterized not by information scarcity, but by media abundance. This section tracks the history of the modern media marketplace to illustrate the rapid evolution of media outlets over the past sixty years.

B. History of the Modern Media Marketplace

1. The Age of Radio

90. At the time commercial broadcast radio was introduced during the early 1920s, newspapers were the primary source of news and information, with circulation reaching nearly 28 million readers.140 The advent of commercial broadcast radio offered the public a far more accessible and immediate mode of receiving information and entertainment than print. It also gave the public additional choices and additional viewpoints.141 Initially, the entertainment community was fearful of competition from this new medium, but they soon embraced radio for the new opportunities it offered.142

91. On November 2, 1920, KDKA, the first licensed commercial radio station, reported the results of the Harding-Cox presidential race.[143] This broadcast marked a significant

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[140] *Historical Statistics of the United States: Colonial Times to 1957, A Statistical Abstract* Supplement, US Department of Commerce, Bureau of the Census at R 169-72.

[141] Alfred D. Chandler, Jr. and James W. Cortada, Eds., A NATION TRANSFORMED BY INFORMATION: HOW INFORMATION HAS SHAPED THE US FROM COLONIAL TIMES TO THE PRESENT (Oxford University Press, New York, NY, 2000) at 149.

[142] Vaudeville theatre owners and booking agents discouraged their acts from performing over radio, fearing competition from the new medium. Similarly, the musical community feared that frequent airplay of songs would render the songs valueless in the sales market. Phyllis Stark, *A History of Radio Broadcasting*, BILLBOARD (Nov. 1, 1994) at http://www.kcmetro.cc.mo.us/pennvalley/biology/lewis/Crosby/billboard.htm (visited Jan. 27, 2003).

[143] Reed Bunzel, B'CASTING (Dec. 9, 1991, Supp.) at 27; *People and*

turning point in the timely dissemination of news; people with radio could hear the results of the election before they could read about it in the newspapers.

92. Although the initial audience for commercial radio was small, there continued to be significant advances in the early years. [144] On August 5, 1921, a major league baseball game was broadcast, providing the first sports broadcast for a mass audience.[145] A year later, Warren G. Harding became the first President to have his voice broadcast by radio.[146] Also that year, the first radio advertisement was aired in New York City.[147] Originally, radio broadcasts were operated by those wishing to promote their own businesses and by radio manufacturers as a means to promote and sell radios themselves. As relevant content grew, so did acceptance of radio by the public and by advertisers, eventually leading to advertising-financed operations.[148] By 1926, just six years after the first official commercial broadcasts, there were 528 stations

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Discoveries: KDKA Begins to Broadcast, WGHB Educational Foundation, at http://www.pbs.org/wgbh/aso/databank/ entries/dt20ra.html (visited Jan.28, 2003); Elizabeth McLeod, *Which Was the First U.S. Radio Station?*, (July 8, 1998) at http://members/aol/com/jeff99500/first.html (visited Feb. 3, 2003). Rich Brown, B'CASTING (Dec. 9, 1991, Supp.) at 6; Jeff Miller, *A Chronology of AM Radio Broadcasting Part 1: 1900-1922* (Nov. 11, 2002) at http://members/aol/com/jeff560/chrono1.html (visited Jan. 31, 2003).

[144] A year after the first licensed commercial broadcast, there were only 100,000 homes with radio, representing only 0.2% of the population. SCHRODERS INT'L MEDIA AND ENT. RPT 2000 (Schroders & Co., 2000) at 257 ("SCHRODERS MEDIA REPORT 2000").

[145] Miller, *supra* note 146 (citing, Joseph Narhan Kane, Steven Anzovin, and Janet Podell, FAMOUS FIRST FACTS (HW Wilson Company, 1998); Bunzel, *supra* note 146.

[146] Miller, *supra*, (citing Kane, Anzovin, and Podell, *supra*).

[147] SCHRODERS MEDIA REPORT 2000, *supra* note 147 at 257.

[148] *Id.*

and 5.7 million radio sets, generating a weekly radio audience of 23 million listeners.[149]

93. In only a decade, radio became important in the daily lives of Americans. By 1931, there were more than 600 radio stations and 12 million radio sets.[150] Unlike today's targeted, niche programming, however, a typical radio station's programming in the early 1930's was largely "variety" format, including a small amount of many different types of programming.[151] Notable and newsworthy events were, of course, the exception to the variety format. In 1932, for example, several New York area radio stations provided continuous coverage of the Lindbergh kidnapping, the first such reporting of its time.[152] The following year, President Roosevelt began delivering his now famous "Fireside Chats." The first of Roosevelt's thirty Fireside Chats occurred on Sunday, March 12, 1933, the nadir of the Great Depression. Those who listened to Roosevelt's broadcast on March 12th heard the President deliver a reassuring message in a calm voice, an impossible conveyance for print media.[153] Roosevelt's voice brought hope to many Americans, who were at the time in need of a direct, personal message from their president. Radio also provided Americans with levity and diversion during the economic hard times of the Depression. Shows like Amos and Andy (1928-1960), Rin-Tin-Tin (1930-1955) and Little Orphan Annie (1931-1942) provided accessible entertainment to a mass audience.[154]

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[149] Bunzel, *supra* note 146 at 27.

[150] Brown, *supra* note 146 at 6.

[151] Programming was made up of about 63 percent music, 21 percent educational, 12 percent literature, three percent religion, and one percent "novelties." Stark, *supra* note 145.

[152] Brown, *supra* note 146 at 10.

[153] Robert A. Wilson and Stanley Marcus, *American Greats* (Public Affairs Press) at www.kevinbaker.info/e_ag_fr fc.html (visited Jan. 24, 2003).

[154] Louis V. Genco, *Old-Time Radio: The Golden Years, The Original Old*

94. Much the same way Roosevelt's direct messages provided instant reassurance during the Depression, contemporaneous broadcasts and on-location reporting provided Americans with a new sense of connectedness and authenticity. Direct reports allowed the listening public to hear events for themselves as they unfolded, as opposed to their waiting for the newspapers to provide written, second-hand accounts. The on-location radio broadcast of the explosion of the zeppelin Hindenberg in 1937, was the first coverage of its kind.[155] Similarly, Americans were notified instantly of the Japanese attack on Pearl Harbor via "breaking news bulletins."[156] But it was President Roosevelt's address to the nation, broadcast on December 9, 1941, the day after war was declared, that attained the largest single audience in radio history to date – an estimated 90 million listeners.[157] During World War II, radio proved a vital asset in the dissemination of news and public-service messages, and it boosted the morale of those remaining on the home-front.

2. The Introduction of Television

95. Although General Electric ("GE") began regular television broadcasting from a station in Schenectady, New York, in 1928, it was not until 1941 that the first commercial television station was introduced.[158] By 1945 there were still

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Time Radio WWW Pages (2003) at http://www.old-time.com/golden_age/index.html (visited Jan. 31, 2003).

[155] A Chicago recording team on a routine assignment recorded the Hindenberg explosion. Because of the event, NBC broke its rigid programming rules and put it on the air. Brown, *supra* note 146 at 10.

[156] James F. Widner, *The Bombing of Pearl Harbor* (2000) at http://www/otr.com/r-a-i-new_pear!.html (visited Jan. 31, 2003).

[157] Brown, *supra* note 146 at 11. Between 1981 and 1998, the number of listeners in the average quarter-hour was approximately 24,000 listeners, compared with the estimated 90 million listeners who tuned in to hear Roosevelt's speech. SCHRODERS MEDIA REPORT 2000, *supra* note 147 at 256.

[158] Steven E. Schoenherr, *History of Television* (Dept. of History: U. of San

fewer than 7,000 television sets in the U.S. and only nine stations on the air: three in New York, two in Chicago and Los Angeles, and one in Philadelphia and Schenectady. By 1947, television had begun to gain popular momentum. The children's series Howdy Doody premiered that year as a one-hour Saturday program. Howdy Doody was significant because of its focus on programming for children, marking the first generation of Americans to be raised with television programming.[159] Meet the Press, the first network television news series, also debuted in 1947.[160] Meet the Press is still aired today and remains the longest running series of any kind on network television.[161] In addition to new programming, many radio stars, like George Burns and Gracie Allen, began to move their acts to television in the late 1940's. With World War II over, and the Depression behind them, Americans began to accept television as a cogent means of receiving information and entertainment.

96. It was during the 1950's, that television first became integrated into the daily lives of Americans. In 1951, just ten years after television's introduction to the public, there were more than 108 stations on the air and more than 15 million households with television sets.[162] Additional validation of the still-new technology was evidenced by the mass exodus of advertisers from radio to television.[163] Furthermore, the

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Diego) at http://history.acusd.edu/gen/recording/television1.html (visited Jan. 27, 2003).

[159] Nielsen Media Research, 2000 RPT ON TV: THE FIRST FIFTY YEARS (2000) at 13 ("THE FIRST FIFTY YEARS").

[160] *Id.*

[161] *Id.*

[162] *Stations on the Air 1946-65*, TV FACTBOOK (1965 Ed) (Warren Publishing, 1965) at 45-a; *Statistical Analysis, 1946-64: The Television Industry*, TV FACTBOOK NO. 35 (Warren Publishing, 1965) at 44-a.

[163] *The History of Film & Television* (High-Tech Productions) at http://www.high-techproductions.com/ historyoftelevision.htm (visited Jan. 27, 2003). Variety Magazine describes the exodus of advertisers from Radio

production of popular programming escalated during the 1950's. In 1951, CBS broadcast the first color television program, and I Love Lucy, one of television's first filmed situation-comedies, debuted, remaining one of the most well-known entertainment programs in television history. In 1952, the Today Show debuted.[164] It was the first, and remains the longest running early-morning network show to date.

3. The Multimedia Landscape I – 1960's

97. By 1960, a multi-media landscape began to form, though media at that time was still dominated by broadcast radio and television. Forty years after the introduction of commercial broadcast radio, and 19 years after the introduction of commercial broadcast television, there were 4,086 radio stations and 573 television stations. [165] Approximately 45 million homes had a television in 1960, and about six million of those had more than one television.[166] Relatively few markets had cable systems in 1960, and nationwide there were only about 750,000 cable subscribers.[167] There were approximately 1,700 daily newspapers in 1960 with a total circulation of about 58 million readers.[168]

98. As the chart below reflects, the number of outlets per market[169] in 1960 varied largely by size of the market. The

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to television as "the greatest exhibition of mass hysteria in biz annals." *Id.*

[164] THE FIRST FIFTY YEARS, *supra* note 162 at 13.

[165] B'CASTING & CABLE YEARBOOK 2000 (R.R. Bowker, 2000) at B-250, D-718.

[166] *Statistical Analysis*, TV FACTBOOK NO. 47 (1987 Ed.) at 67-a; *1946-64: The Television Industry*, *supra* note 165 at 44-a.

[167] MOWG Study No. 1, A Comparison of Media Outlets and Owners for Ten Selected Radio Markets by Scott Roberts, Jane Frenette, and Dione Stearns (Sept. 2002) at Table 2 ("MOWG Study No. 1"); Kagan World Media, CABLE TV INVESTOR (May 24, 2002) at 8.

[168] *Historical Statistics of the United States: Colonial Times to 1957*, *supra* note 143 at R 169-72.

[169] This study compared the availability and ownership of media in ten

smallest markets had few choices, while large markets had comparatively more outlets for news, information, and entertainment.

Selected Media Outlet Counts for Ten Radio Markets – 1960

Radio Market	*Radio Mkt Rank*	*Radio Total*		*TV Total*		*Newspapers*	
		Stations	*owners*	*station s*	*owners*	*daily*	*owners*
New York NY	*1*	74	52	7	7	8	8
Kansas City MO	*29*	18	15	3	3	1	1
Birmingham AL	*57*	22	19	4	3	2	1
Little Rock AR	*85*	12	12	3	3	2	2
Lancaster PA	*113*	7	5	5	5	2	1
Burlington VT/ Plattsburgh NY	*141*	10	9	2	2	2	2
Myrtle Beach SC	*169*	4	4	1	1	1	1
Terre Haute IN	*197*	9	7	1	1	2	1
Charlottesvil le VA	*225*	7	4	0	0	1	1
Altoona PA	*253*	6	5	3	3	1	1

Source: MOWG Study No. 1, selected information from Tables 1, 2, and 3.

99. An informal analysis of the news and public interest programming available to the public over television in 1960,[170]

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different radio markets. The radio market represents a core geographic area where most consumers reside. Virtually all media is available from the perspective of these residents. MOWG Study No. 1, Executive Summary, n.1. This market definition is not necessarily consistent with the market definition in our rules.

[170] In this analysis, Commission staff examined current and historic *TV Guide* magazines to determine the amount of differing types of programming (local news, national news and public interest programming) provided by

revealed that in selected sample markets, local news programming in 1960 was limited to approximately one or two hours per-station, per-day (or a total of three to five hours of local news programming produced daily by all television stations combined in a given market).[171] National news programming in 1960 was in most cases limited to anywhere from five minutes per-station, per-day, to one hour per-station, per-day. As a result, in most markets, there was less than one-hour of national news programming broadcast daily by all the stations combined in a given market.[172] Programming characterized as "public interest programming"[173] on average was aired for about two to three hours per-station, per-day (or approximately six to nine hours of public interest programming produced per-day by all stations combined in the markets we reviewed).[174] Faced with this set of facts, FCC Chairman Newt Minow denounced television programming, a "vast wasteland," and urged television broadcasters to program more responsibly.[175] That same day, however, Senator Hubert

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stations in markets of differing sizes. The study examined the amount of programming available in a sample day in three cities, New York, Little Rock, and Terre Haute, selected from the larger group of ten cities represented in MOWG Study No. 1. The three cities chosen for this particular informal study were each chosen to respectively represent small, medium, and large television markets. Programming schedules for between the hours of 6am and midnight on July 1st of the given year were examined for each city to determine how much of each type of programming was available to consumers in the selected market. ("Three City Study").

[171] *Id.* Since consumers can only watch one program at a time, the figures represented in this summary are greater than the actual amount of programming that was potentially available to the average consumer.

[172] *Id.*

[173] Public Interest Programming is defined for these purposes as programming of cultural, civic, children's, family, public affairs and educational interest. *Id.*

[174] *Id.*

[175] On May 9, 1961, FCC Chairman Newton N. Minow said before a meeting of television executives: "I invite each of you to sit down in front of

Humphrey called television "the greatest single achievement in communication that anybody or any area of the world has ever known."[176] As a communication medium, television held great potential, but whether or not television provided a valuable service to the American people was still a point of contention.

4. Television Evolves

100. Just a few years later, few could argue with the notion that television had become a vital tool for the timely dissemination of news and information.[177] Between 1960 and 1963, several historical events were broadcast over television, changing the very medium itself and its role in society. On September 26, 1960, the first of four debates between presidential candidates Richard M. Nixon and John F. Kennedy was televised to an audience of more than 28 million homes.[178] Prior presidential debates had only been broadcast over radio. Historians note that those listening to the debate on radio thought Nixon had won, while those viewing the debate on

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your own television set when your station goes on the air and stay there for the day. . . I can assure you that what you will observe is a vast wasteland." Minow went on to say that: "It is not enough to cater to the nation's whims; you must also serve the nation's needs." *Speeches*, The History Channel.Com at http://www.historychannel.com/cgi-bin/frameit.cgi?p=http%3A//www.historychannel.com/speeches/archive/speech_194.html (visited Apr. 23, 2003).

[176] *Media Literacy: Timeline of Broadcast Television*, University of California at Santa Barbara at http://www.uweb.ucsb.edu/~rena/ttv.html (visited Apr. 23, 2003). In an article run in THE NEW YORK TIMES MAGAZINE in 1966 industry analysts contended that "TV is not an art form or a cultural channel; it is an advertising medium...it seems a bit churlish...of people who watch television to complain that their shows are lousy. They are not supposed to be any good. They are supposed to make money." *Id.* This perspective is still prevalent today. Bob Thompson, *Lust-See TV*, THE NEW YORK TIMES MAGAZINE (Jan. 26, 2003) at W13.

[177] Today, "television dominates in political news and political advertising, provides breaking news, and conveys the immediacy and emotional impact of its visual images." AFL-CIO Comments at 35.

[178] THE FIRST FIFTY YEARS, *supra* note 162 at 30.

television thought Kennedy had won.[179] The use of television by political candidates, and the subsequent need for them to adopt a "television persona," thus ushered in a new era in American politics and a new era for television as an important medium of communications.

101. In 1963, television provided live coverage of Martin Luther King Jr.'s "I Have a Dream" speech."[180] Dr. King's speech was not the first act of the civil rights movement, but its broadcast on national television provided activists nationwide the information and the inspiration on which to mobilize America into one of the most turbulent and progressive eras in its history. Later that year, television unified Americans in mourning when word of President Kennedy's assassination was announced in a breaking news bulletin at 1:40pm EST, November 22, 1963. An estimated 180 million Americans watched their television sets almost continuously for four days, including the reporters themselves, who in many cases knew no more than the viewers.[181] For the first time, the nation was witnessing the same tragic event in unison. Television had become the "window of the world."[182]

5. The Introduction of Non-Broadcast Networks

102. From its beginnings in 1948, through the late 1960's, cable television extended the reach of broadcast television to a

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[179] John F. Kennedy's composed disposition and visual charm contrasted sharply on camera with a seemingly nervous and shifty-eyed Richard Nixon. Steve McClellan and John Eggerton, *Getting the Picture: TV Takes The Stage*, B'CASTING (Dec. 9, 1001) at 33.

[180] Chandler and Cortada, *supra* note 144 at vi.

[181] *America's Long Vigil*, TV GUIDE (Jan. 25, 1964) at http://members.aol.com/jeff570/tvgjfk.html (visited Jan. 27, 2003).

[182] Ron Cochran of ABC news is reported to have said: "Television had actually become the window of the world so many had hoped it might be one day." *Id.*

few more than one million subscribers.[183] These early cable systems (originally known as "community antenna TV systems") were born out of the need to carry television signals into areas where over-the-air reception was either non-existent or of poor quality because of interference. In some cases, cable provided limited amounts of locally distributed non-broadcast programming, but it wasn't until the creation of nationally distributed, non-broadcast cable programming that cable became a competitive medium for the dissemination of news, information, and entertainment. Initially, cable operators provided non-broadcast programming for a fee in order to boost revenue. Such programming was called "premium" or "pay-TV." By doing so, however, they increased consumer interest in cable service, thus boosting subscribership. HBO debuted in 1972 as a regional pay-TV network. In 1975, it became the first major national pay-TV network, distributing its service via satellite technology.[184] Satellite distribution gave HBO the ability to reach all cable subscribers nationwide. The launch of HBO over satellite was closely followed by the launch of the pay-TV network Showtime in 1976. By 1977, pay-TV households surpassed the one million subscriber mark, and total cable subscribership reached 12.2 million subscribers.[185]

103. Other satellite-distributed networks soon followed HBO and Showtime. In 1976, Turner Broadcasting Company launched the first "basic" cable network, TBS by nationally distributing its Atlanta-based broadcast station. Unlike HBO, TBS did not derive its proceeds from subscription fees, but rather all of its revenue derived from the sale of advertising.[186]

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[183] *Supra* note 170 at 8

[184] Brown, *supra* note 146 at 19-21; Matt Stump and Harry Jessell, *Cable, The First Forty Years*, BROADCASTING (Nov. 21, 1988) at 42. Earlier attempts at pay-TV in certain cable systems in the late fifties were short-lived. *Id.*

[185] Brown, *supra*; *see also* CABLE TV INVESTOR, *supra* note 170 at 9.

[186] Years later, TBS received revenues from subscriptions fees charged to

Following TBS, numerous other basic cable networks developed, many providing non-broadcast niche programming; increased competition had resulted in the increased segmentation of the available audience.[187] Unlike the general interest, "variety" programming of the broadcast television networks, many non-broadcast basic cable networks provided highly specialized programming and provided it on a 24-hour basis. Thus, the inclusion of non-broadcast networks in the array of media choices gave the public continuous access to national news, information, and entertainment [e.g., all-sports network, ESPN (1979), children's and family programming network, Nickelodeon (1979), all-news network, CNN (1980), black-entertainment network, BET (1980), and all-weather network, The Weather Channel (1982)].

104. Cable operators subsequently found a market for their services in heavily populated urban areas as well as the predominately small-market rural areas they first served. At the time of HBO's initial national distribution in 1975, total cable subscribership nationwide was approximately 9.8 million.[188] Only five years later in 1980, with the addition of numerous pay-TV and basic cable networks, there were more than 19.2 million subscribers, an increase of 95.3 %.[189] But as a competitor to broadcast radio and television, cable's appeal was primarily national in orientation. Although some regional and local non-broadcast networks were distributed during the 1970's and 1980's, the banner offerings of cable systems during that period were nationally-distributed networks.

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cable operators, in addition to the revenue it derived from advertising.

[187] *See* CST Comments at 3.

[188] Kagan World Media, BROADBAND CABLE FINANCIAL DATABOOK (July 2002) at 7, 10.

[189] CABLE TV INVESTOR, *supra* note 170 at 9.

6. The Introduction of Home-Use Satellite Television Technology

105. Home satellite dish ("HSD") technology was developed not long after satellite distribution technologies were introduced. HSD technology is based on the same system used by cable operators to receive network signals from satellites for delivery over their terrestrial cable systems; HSD is essentially the home reception of signals transmitted by satellites operating in the C-Band frequency.[190] First developed in 1976, HSD technology was commercialized around 1979.[191] At its inception, HSD owners used an eight foot dish to receive unscrambled "feed" programming for free, and scrambled programming purchased in a secondary market from licensed program packagers. Owners of HSD systems could gain access to hundreds of channels of programming placed on C-Band satellites by programmers for national cable distribution.[192] HSD enhanced consumer access to non-broadcast television programming, much the same way cable served to enhance broadcast television service in its early years.[193]

7. The Multimedia Landscape II – 1980's

106. By 1980, traditional media (i.e., broadcast radio and television) still dominated mainstream use, but the public did have other options. Many could now choose among both

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[190] Satellites in the C-Band frequency are also used to transmit programming to cable operators via C-Band receiving dishes at the cable central office or "headend."

[191] *Media Business Corp., History of DTH*, SKY RPT, at http://www.skyreport.com/dth_his.cfm (visited May 19, 2003).

[192] *How Many DTH Households Are Out There Anyway?*, SKY RPT (Oct. 1994) at 1. Much of the decline in HSD subscribership results from owners switching to DBS services. Not only are DBS dishes smaller in size and easier to maintain, but they are also less expensive than typical HSD equipment

[193] At its peak of popularity in 1994, there were an estimated 4.5 million active HSD users, roughly half of whom subscribed to one or more programming services.

broadcast and non-broadcast television programming to access news, information and entertainment. There were more than 9,278 radio stations in 1980, and 1,011 broadcast television stations.[194] Approximately 77.8 million homes had a television in 1980 and about 39.7 million of those had more than one television.[195] There were about 19.2 million cable subscribers and HSD was added to the marketplace in 1980.[196] There were also about 1,745 daily newspapers in 1980 with a total circulation of 62.2 million readers.[197] In addition to the traditional broadcast television stations offered over-the-air and via cable systems, there were also approximately 20 nationally-distributed non-broadcast networks available to the public nationwide and an unknown number of regionally distributed non-broadcast networks.[198]

107. The number of media outlets per market varied in 1980 based on market size, as they had in 1960. Overall, however, as the chart below indicates, most markets seemed to have at least doubled the number of television stations and station owners that they had in 1960.[199]

Selected Media Outlet Counts for Ten Radio Markets – 1980

Radio Market	*Radio Mkt Rank*	*Radio Total*		*TV Total*		*Newspapers*	
		station s	*owners*	*Stations*	*owners*	*daily*	*Owner s*
New York NY	*1*	128	100	17	15	8	8
Kansas City MO	*29*	36	27	6	6	1	1
Birmingham AL	*57*	35	27	7	6	1	1

[194] Cable and Services Vol. 52, TV & CABLE FACTBOOK (1984 ed.) at 17.

[195] Nielsen Report on Television (1982) at 3.

[196] CABLE TV INVESTOR *supra* note 168 at 9.

[197] NAA, FACTS ABOUT NEWSPAPERS (2002) at 4, 12, 14.

[198] *1994 Video Competition Report*, 9 FCC Rcd at 7589-92; *see also 2002 Video Competition Report*, 17 FCC Rcd at 26989-91.

[199] MOWG Study No. 1.

Little Rock AR	*85*	26	23	6	4	2	2
Lancaster PA	*113*	11	7	7	7	2	1
Burlington VT/ Plattsburgh NY	*141*	24	19	10	7	2	2
Myrtle Beach SC	*169*	16	11	4	3	1	1
Terre Haute IN	*197*	18	13	5	5	2	1
Charlottesville VA	*225*	10	7	1	1	1	1
Altoona PA	*253*	12	7	5	5	1	1

Source: MOWG Study No. 1, selected information from Tables 1, 2, and 3.

108. Our informal analysis of the news and public interest programming available to the public via television[200] revealed that, on average, most television stations in the markets we reviewed were airing more local news programming in 1980 than they did in 1960, though some small market stations were airing less local news programming.[201] In addition, in the large

[200] Three City Study, *supra* note 173.

[201] In New York and Little Rock, most television stations aired more hours of local news programming in 1980 than they aired in 1960. Thus, on average, the total number of hours of local news programming aired in a given day was greater than in 1960. In Terre Haute, some television stations aired more hours of local news programming that they aired in 1960, while others aired fewer hours of local news programming than they aired in 1960. Thus, on average, the total number of hours of local news programming aired in Terre Haute on a given day was less than in 1960. Since consumers can only watch one program at a time, the figures represented in this summary of programming available in 1980 are greater than the actual amount of programming that was potentially available to the average consumer, but are relative to the figures in the summary of programming aired in 1960. This does not necessarily hold true for increases resulting from the addition of stations. The additional television stations in the market could be airing programming simultaneously with other stations in the market. Thus these figures would not represent a greater number of hours of programming available to a given consumer, but would represent a greater number of voices in a given market.

market that we studied, New York, there were more television broadcast stations available to the public than there were in 1960, resulting in a greater total amount of local news produced in these markets, on a given day.[202] National news was aired over television broadcast stations for about thirty or forty-five minutes per station per day, an increase over 1960 when many stations aired little or no national news programming.[203] In addition, a non-broadcast television network, CNN, aired national news programming for 24-hours per day, and was available to all those with access to cable or HSD systems, marking a significant shift in viewing habits from the sixties when news and coverage of significant events like the Vietnam War were available only during regularly-scheduled news programming.[204] More broadcast television stations aired public interest programming in 1980 than in 1960, particularly in large and medium-sized markets In addition, there were several new non-broadcast television networks providing public interest programming on a 24-hour basis.[205] In short, the addition of nationally distributed non-broadcast television networks, an increase in the number independent and affiliate broadcast television stations and in the number of hours broadcast per station, resulted in an increase in the news and

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[202] In New York there were five more television broadcast stations available in 1980 than there were in 1960, each airing as much as one to two hours of local news content daily. In Little Rock and Terre Haute, there were the same number of television stations with local news programming in 1980 as there was in 1960. *Id.*

[203] Three City Study.

[204] Brown, supra note 146 at 24; Robert J. Thompson, *500 Channels But No Clear Picture of What We Want*, THE WASHINGTON POST (May 23, 2003) at B3.

[205] Among the non-broadcast television networks providing public interest programming were C-SPAN, launched in 1979; Bravo, launched in 1980; The Family Channel launched in 1977; Nickelodeon, launched in 1979, and The Learning Channel, launched in 1980.

public interest programming available in markets of all sizes between 1960 and 1980.

8. Competitive Pressure Builds: A Crowded Programming Market

109. The amount of competitive programming available on cable continued to increase during the eighties and into the nineties. CNN was the first non-broadcast news network considered formidable competition to the news provided by the well-established broadcast networks in the 1980s.[206] In addition to providing direct competition, CNN provided consumers access to 24-hour news coverage.[207] The concise format of a majority of non-broadcast programming networks (e.g., MTV, which provided music videos; the Weather Channel which provided successive national, regional, and local forecasts; CNN's Headline News, which provided cycling national news briefs), was attractive to audiences who were developing a preference for scanning quickly through the many new channel offerings available to them. While some non-broadcast networks were providing general interest fare in the mold of the traditional broadcast networks (e.g., USA Network, Turner Network Television, TBS), many provided programming geared towards a particular audience interest (e.g., children, young adults, sports, weather, news). Regionally distributed non-broadcast networks also flourished in the 1980's through the 1990's. More than 25 regional networks commenced service in the eighties and more than 51 regional networks commenced service in the nineties. Some of these networks provide regional sports (e.g., Fox Sports Northwest, Fox Sports Cincinnati, SportsChannel Florida),

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[206] Brown, *supra* note 146 at 21. Later, in 1991, CNN captured large audiences with its 24-hour coverage of the Persian Gulf War.

[207] In 1968, coverage of the Vietnam War amounted to the evening newscasts on the broadcast networks. Today, coverage of the War in Iraq is available over the broadcast networks and on three separate "round-the-clock" cable news channels – "72/7." Thompson, *supra* note 207.

regional and local news (e.g., News 12 Long Island, County Television Network San Diego, Pittsburgh Cable News Channel), or regional-interest programming (Sunshine Network, Nippon Golden Network, California Channel).

110. When the Fox broadcast network launched as a challenger to the "Big Three" networks in 1985, it entered the market building on the niche concept employed by the non-broadcast networks. Fox provided general interest fare, like its broadcast competitors, but targeted its programming to the teenage demographic.[208] Later, in January 1995, Paramount and Warner Brothers launched the UPN and WB networks, respectively, both building on similar demographics on which Fox had initially entered the market.[209]

9. Significant Technological Advances: Recorded Media, Digital Compression, and the Internet

111. Several significant advances in technology during the 1980's and 1990's supplied the footing for increased competitive pressure on the media marketplace. Record-and-playback devices and digital technologies transformed traditional and new media into high-capacity, high-quality, interactive outlets for accessing content. The Internet, as an entirely new medium, composed of an amalgam of all the technologies that preceded it, completely transformed the way in which we communicate in unimaginable ways. These advances not only enabled the provision of vast amounts of content they also put more control in the hands of the public, allowing them to control what, when, and how they receive information.

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[208] Brown, *supra* note 146 at 21.

[209] United Paramount Network, *The Facts* at http://www.viacom.com/prodbyunit1.tin?ixBusUnit=30; WTTA–Tampa Bay, Fl, *Warner Bros. Network* at http://wtta38.com/ads/history.htm (visited May 22, 2003).

112. The video-cassette recorder ("VCR"), first introduced in the United States in the mid-1970s, was the first of such empowering technologies. Not until 1982 did the VCR become inexpensive enough to spur widespread adoption by the public.[210] By 1986, more than 13 million VCRs had been sold in the United States.[211] The VCR empowered the public with the ability to stray from the pre-set video programming schedule inherent in broadcast television content. Furthermore, content not available over other video media, or content which had been previously available over broadcast television was created specifically for VCR consumption.

113. More significant than record-and-playback devices, digital technology was used in the development of advanced satellite distribution systems. Prior consumer satellite systems were wholly analog and because of their size, were impossible to deploy in urban areas. Direct broadcast satellite systems ("DBS") provided an all-digital transmission of video programming, employing a small satellite dish, practical for both rural and urban deployment. The public has adopted DBS service at one of the fastest rates of any consumer good in history. At the end of 1994, DBS services had approximately 600,000 subscribers.[212] By 1995, there were more than 2.2 million subscribers, and by 2000, DBS providers had nearly 14.8 million subscribers.[213] Today, DBS is a significant competitor in the market for the delivery of multichannel video programming distribution services ("MVPD"), with more than 18 million subscribers.[214] In fact, between June 2001 and June

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[210] *See Important Events in VCR History* at http://www.sit.wisc.edu/~mklathro/TimIine%20of%20Important%20Events.html (visited Feb. 6, 2003).

[211] *Id.*

[212] Kagan World Media, THE STATE OF DBS 2002 (July 2002) at 4.

[213] Kagan World Media, ECON. OF BASIC CABLE NETWORKS 2002 (Sept. 2001) at 23-27.

[214] *2002 Video Competition Report*, 17 FCC Rcd at 26975.

2002, growth in the number of cable subscriptions leveled off to less than one-half of one percent (0.4%), while DBS's growth rate was 14% for the same time period. [215] Overall, from 1994 until today, DBS subscribership has grown by an average of about 70% each year.[216]

114. DBS provides a much higher channel capacity than most, if not all, cable systems choose to provide. From its inception, DBS operators have been able to transmit over 200 channels of video programming to their subscribers. The presence of DBS in the market for the delivery of subscription video programming has expanded the market, such that now almost all televisions households have access to subscription video. In addition, the competitive presence of DBS has forced cable television services to expand channel capacity and service options.

115. As a result of the introduction of the all-digital DBS technology and its widespread acceptance by the public, cable television operators began replacing much of their original coaxial cable infrastructure with hybrid fiber and coaxial cable ("HFC") networks. By doing so, cable operators were able to employ digital technology to transmit high-quality video signals to their customers. In addition, digital technology expanded the channel capacity of the networks, enabling cable operators to provide vastly more channels of video programming. Many cable operators began offering a "digital tier" of service. First introduced commercially in 1996, "digital cable" does not actually provide digital video to the consumer; rather it uses digital compression technology to provide

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[215] *Id.* 26905.

[216] *See supra* note 215; *see also* Hughes Electronics Corp., *SEC Form 10-K405 for the Year Ended December 31, 2001* at 3-4; *Hughes Electronics Corp., SEC Form 10-K for the Year Ended December 31, 2002* at 3; EchoStar Communications Corp., *SEC Form 10-K for the Year Ended December 31, 2002* at 10.

[216] *Supra* note 216.

additional channels of basic and premium services for an additional fee.[217] At year-end 1996, there were approximately 100,000 digital video subscribers.[218] By year-end 2001 there were approximately 16.7 million digital video subscribers.[219] Digital technology also furthered the ability of cable operators to implement advanced two-way services.[220]

116. Several digital record-and-playback technologies were also introduced in the 1990s. Digital versatile disc ("DVD") players were first introduced in the United States in 1997, and have quickly become popular.[221] The personal video recorder ("PVR"), introduced in 1999, is a device connected to a television set, either embedded in an STB or as a stand-alone device, which uses a hard disk drive, software, and other technology to digitally record and access programming. PVR technology allows a consumer to pause, replay, rewind, fast-

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[217] *See* Paul Kagan Assocs., Inc., *Paul Kagan's 10-Year Cable TV Industry* Projections, THE CABLE TV FINANCIAL DATABOOK (July 1996) at 11; *see also* Paul Kagan Assocs., Inc., *Paul Kagan's 10-Year Cable TV Industry* Projections, THE CABLE TV FINANCIAL DATABOOK (July 1997) at 10. In some cases, the video programming offered on cable's digital tier is offered at a higher quality than standard analog video. In other cases, the digital tier is used simply to compress more analog-quality channels into the same bandwidth.

[218] 1997 DATABOOK, supra at 10.

[219] BROADBAND DATABOOK, *supra* note 191 at 10.

[220] The advanced broadband services discussed here include cable telephony and Internet Protocol ("IP") telephony, Internet access through cable modems, digital video, video-on-demand ("VOD") and near-video-on-demand ("NVOD"), and interactive guides/interactive programming. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 FCC Rcd 6005, 6015, n.11 (2001) ("*2000 Video Competition Report*").

[221] Steven Schoenherr, *Recording Technology History* (Oct. 30, 2002) at http://history.acusd.edu/gen/ recording/notes.html (visited Feb. 6, 2003).

forward and otherwise time-shift television programs similar to the VCR.[222]

117. In addition to these other significant technological advancements of the 1980's and 1990's, the Internet has spawned an entirely new way of looking at media. The first graphical Interface for the Internet was proposed in 1989 (later to be called the World Wide Web or the "Web").[223] In 1992, there were only 50 Web sites in the world; a year later there were still no more than 150 Web sites.[224] Then, in late 1993, Mosaic was launched, providing an easy-to-install, easy-to-use program for accessing the Web.[225] By 1994, commercial Web sites proliferated so that by year-end, there were as many as 3,000 Web sites.[226] A year later, there were more than 25,000 Web sites in use.[227] By year-end 2000, there were more than 30 million web sites.[228]

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[222] TiVo Inc., SEC Form 10-K405 (Mar. 30, 2000); ReplayTV Inc., SEC Form S-1/A (May 1, 2000). While PVRs cannot play prerecorded videocassettes or DVDs, they make it relatively simple to record broadcast, cable or DBS television signals and provide the user with the same level of control over the playback of a movie as home video provides.

[223] Prior to this time, the Internet consisted of computers linked in a large-scale network for the purpose of file sharing based on text-only protocols. Shahrooz Feizabadi, *History of the World Wide Web* at http://ei.cs.vt.edu/~wwwbtb/book/chap1/ web_hist.html (visited Feb. 6, 2003); Walt Howe, *A Brief History of the Internet* (Apr. 2002) at http://www.walthowe.com/navnet/history.html (visited Feb. 6, 2003).

[224] Richard Griffiths, *Chapter Two: From ARPANET to World Wide Web* at http://www.leidenuniv.nl/ history/ivh/chap2.htm (visited Feb. 6, 2003).

[225] *Id.*; Walt Howe, *A Brief History of the Internet* (Apr. 2002) at http://www.walthowe.com/navnet/ history.html (visited Feb. 6, 2003); Robert H Zakon, *Hobbes' Internet Timeline v6.0, 2003* at http://www.zakon.org/Robert/ internet/timeline/ (visited Feb. 6, 2003).

[226] *Supra* note 227.

[227] *Id.*

[228] *Id.* While most of the information currently on the Web is "still-graphics," real-time and downloadable video available over the Web has

118. Today the Internet affects every aspect of media, from video and audio, to print and personal communications.[229] Whereas other forms of media allow for only a finite number of voices and editorially-controlled viewpoints, the Internet provides the forum for an unlimited number of voices, independently administered. Furthermore, content on the Web is multi-media; it can be read, viewed, and heard simultaneously. Since Web pages are stored on Web-hosting file servers, accessing Web content is a highly individualized activity, and any individual with access to a Web browser can access all available Web content 24-hours a day throughout the world.

119. Virtually every major media company has a corresponding Web site, today, and any individual with access to a Web-hosting file server can create a Web site for public access. As such, the Web provides an unrestrained forum for the dissemination and consumption of ideas. News and Information are available on the Internet like they have never been available to the public before. Internet users can view the news source of their own choosing, such as CNN or The New York Times, or can use a news gathering service like Google News which presents information culled from approximately 4,500 news sources worldwide.[230] Furthermore, Internet users can access content that may have appeared in print or on broadcast television at an earlier time, giving them greater control over traditionally available content.

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become more commonplace.

[229] Fox Comments at iii.

[230] *A Novel Approach to News*, Google News (BETA) at http://www.google.com/help/about_news_search.html (visited May 27, 2003). The headlines that appear on Google news are selected entirely by computer algorithms, based on how and where the stories appear elsewhere on the web. There are no human editors at Google selecting or grouping the headlines and no individual decides which stories get top placement.

10. The Multimedia Landscape III – 2000

120. Since the 1960's, there has been tremendous growth in the media market.[231] By 2000, American consumers had access to a multitude of media outlets, hundreds of channels of video programming, and enormous amounts of content not available just twenty, or even ten years earlier. There were more than 12,615 radio stations in 2000, and 1,616 broadcast television stations.[232] Approximately 100.8 million homes had a television in 2000 and 76.2 million of those had more than one television.[233] There were 68.5 million cable subscribers in 2000, approximately 14.8 million DBS subscribers and 1.2 million HSD subscribers.[234] There also were 1,480 daily newspapers in 2000 with a total circulation of 55.8 million readers.[235] In addition to the traditional broadcast television stations offered over-the-air and via cable systems, there were 281 nationally-distributed non-broadcast networks available in 2000 and 80 regional non-broadcast networks.[236] Approximately 42.5 million households subscribed to an Internet access provider in 2000.[237]

121. The number of outlets per market also grew significantly between 1980 and 2000. As the chart below

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[231] NAB Comments at 8-9.

[232] B'CASTING & CABLE YEARBOOK 2002-2003 at B-241, D-739.

[233] Nielsen Media Research.

[234] *2002 Video Competition Report*, 17 FCC Rcd at 26911, Table 1; *see supra* note 216.

[235] NAA, *supra* note 200 at 4, 12, 14.

[236] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1249-1253 (2002) ("*2001 Video Competition Report*").

[237] ECONOMICS OF BASIC CABLE NETWORKS 2002, *supra* 216 at 23-27; Veronis Suhler Stevenson-Media Merchant Bank, *Internet Households and Household Penetration*, COMMUNICATIONS INDUSTRY FORECAST (July 2002) at 267.

indicates the number of radio outlets grew by 142% from 1960 to 2000 and the number of independent radio station owners grew by 74% in that same time period. The number of television outlets grew by 217% from 1960 to 2000 and the number of independent television station owners grew by 150% in that same time period. The number of newspapers declined by 9% from 1960 to 2000 and the number of newspaper owners was the same in 2000 as it was in 1960.

Selected Media Outlet Counts for Ten Radio Markets – 1960,1980, 2000

Radio Market	*Radio Mkt Rank*	*Year*	*Radio Total*		*TV Total*		*Newspapers*	
			stations	*owners*	*stations*	*owners*	*daily*	*owners*
New York NY	*1*	*2000*	148	84	24	22	9	9
		1980	128	100	17	15	8	8
		1960	74	52	7	7	8	8
Kansas City MO	*29*	*2000*	40	22	9	7	1	1
		1980	36	27	6	6	1	1
		1960	18	15	3	3	1	1
Birmingham AL	*57*	*2000*	45	25	9	8	2	2
		1980	35	27	7	6	1	1
		1960	22	19	4	3	2	1
Little Rock AR	*85*	*2000*	42	21	13	8	2	2
		1980	26	23	6	4	2	2
		1960	12	12	3	3	2	2
Lancaster PA	*113*	*2000*	13	11	7	2	2	1
		1980	11	7	7	7	2	1
		1960	7	5	5	5	2	1
Burlington VT/ Plattsburgh NY	*141*	*2000*	37	22	11	7	2	2
		1980	24	19	10	7	2	2
		1960	10	9	2	2	2	2
Myrtle Beach SC	*169*	*2000*	29	16	6	4	0	0
		1980	16	11	4	3	1	1
		1960	4	4	1	1	1	1
Terre Haute IN	*197*	*2000*	24	14	5	5	1	1
		1980	18	13	5	5	2	1
		1960	9	7	1	1	2	1
Charlottesville VA	*225*	*2000*	17	8	2	2	1	1
		1980	10	7	1	1	1	1
		1960	7	4	0	0	1	1
Altoona PA	*253*	*2000*	14	7	6	5	0	0
		1980	12	7	5	5	1	1
		1960	6	5	3	3	1	1

Source: MOWG Study No. 1, selected information from Tables 1, 2, and 3.

122. The number of hours of news and public interest programming has also grown significantly since 1980. Whereas in 1960 and 1980, there was on average only about one or two hours of local news programming per-station, per-day in the markets we reviewed, local news programming expanded to about two to four hours per station per day by 2003.[238] In addition, several regional and local news networks were launched between 1980 and 2003, providing local news on a 24-hour basis in numerous markets throughout the country.[239] Although in most markets, only a few stations increased the amount of national news programming available from 1980, when national news was aired for about thirty to forty five minutes per station per day, there were more broadcast stations airing national news in 2003, and several non-broadcast news networks airing national news programming on a 24-hour a day basis.[240] Public interest programming also has proliferated. Although television broadcast stations in various markets were airing about the same amount of public interest programming per-station in 2003 as they were in 1980, in 2003, there are more television broadcast stations per-market and numerous new non-broadcast networks providing such programming.[241]

11. The Current Competitive Landscape and Developments Since 2000.

123. Non-broadcast television programming continue to proliferate. Today, there are more than 308 satellite-delivered national non-broadcast television networks available for carriage over cable, DBS and other multichannel video program

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[238] Three City Study, *supra* note 173.

[239] Regional news networks available over cable and DBS include: San Diego's News Channel 15, NorthWest Cable News, Ohio News Network, Pittsburgh Cable News Channel; News 12 Connecticut, News 12 Long Island, News 12, New Jersey, New England Cable News, Las Vegas One News, News 8 Austin, etc.

[240] *E.g.*, Fox News, MSNBC, and CNBC.

[241] *E.g.*, Disney, Discovery, History Channel, etc.

distribution ("MVPD") systems.[242] In 2002, the Commission also identified at least 86 regional non-broadcast networks, including 31 sports channels, and 32 regional and local news networks.[243] We are moving to a system served by literally hundreds of networks serving all conceivable interests. Programming in particular abundance are sports, entertainment, and informational in nature.[244] The four largest broadcast networks own both broadcast and cable channels. Their share of viewership is far greater than their share of the channels received by the typical American household.[245] Of the 102 channels received by the average viewing home, the four largest broadcast networks have an ownership interest in approximately 25% of those channels.[246]

124. Since its inception, non-broadcast programming has gained significantly in popularity as compared with broadcast programming. In 2002, for the first time, cable television collectively had more primetime viewers on average over the course of the year than broadcast programming (48% share for cable programming versus 46% share for broadcast programming).[247] In June 2002, cable networks for the very first time collectively exceeded a 50% share for the month (54% primetime share), while the broadcast networks

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[242] *2002 Video Competition Report*, 17 FCC Rcd at 26905.

[243] *Id.* at 26907-8.

[244] CST Comments at 3-4.

[245] Nielsen Galaxy Explorer; *Nielsen Ratings*, B'CASTING & CABLE (Mar. 24, 2003) at 14; *2002 Video Competition Report*, 17 FCC Rcd at 26995-97; *Who Owns What*, Columbia University Law School at www.cjr.org.

[246] Opening Statement of David F. Poltrack, Executive Vice President, CBS Television, before the Forum on Media Ownership Rules, Columbia University Law School, New York, NY (Jan. 16, 2003) ("Poltrack Statement").

[247] Mike Reynolds, *2002: Cable's Breakout Nielsen Year*, MULTICHANNEL NEWS (Jan. 6, 2003) at 3.

collectively registered a 38% primetime share.[248] The September 2002 season premier of "The Sopranos" on HBO was the most watched original program in HBO history and was the week's most watched program among adults 18-34.[249] The season finale in December was the top-rated program that night with 12.5 million viewers, besting the 12.2 million viewers for the top-rated network broadcast program.[250] Furthermore, HBO had more 2002 Golden Globe nominations than any other network (broadcast and non-broadcast alike), and went on to win twice as many awards as any other network.[251] At the 2002 Primetime Emmys, HBO won 24 Emmys, tying NBC for the most awards given to a single network.[252]

125. As television broadcasters face intense competitive pressure from alternative video programming, they are entering a new era themselves. Broadcasters are currently experimenting with, and beginning to commercially deploy, digital and high-definition television ("DTV" and "HDTV"). Commenters in this proceeding have said that Federal policy should have as one of its main objectives, the encouragement of digital conversion and expansion of transmission plants.[253] The Commission anticipates the full transition of broadcast signals such that broadcast television signal distribution will be either DTV or HDTV, replacing the NTSC analog standard. Digital television offers improved picture quality over standard analog television, and the ability for broadcasters to provide such additional enhancements as HTDV (superior quality to analog

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[248] Allison Romano, *Cable Breaks 50-Share Mark in Primetime*, B'CASTING & CABLE (July 8, 2002) at 12.

[249] AOL Time Warner, *Home Box Office: Key Company Facts* at http://www/aoltw.com/companies/hbo_ index.adp (visited May 21, 2003).

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] CST Comments at 4.

television), multicasting (the ability to offer multiple channels in a spectrum band that today would allow only a single transmission stream), and interactivity (two-way communication abilities between the broadcaster and the consumer). Cable operators and DBS service providers are also beginning to provide DTV and HDTV options.

126. While the surge of media availability in the last several years has led to an increase in the quantity and quality of programming available, the competitiveness between different video media has also led to increased individual choice. Today's media marketplace provides choices to the public on an entirely new, personal level. In addition to the Web, for example, video-on-demand ("VOD") is the newest video technology being developed and deployed by cable and DBS operators. VOD services provide advertising-free material on a program-by-program basis, similar to the pay-per-view services that preceded it. VOD, however, provides a much wider array of programming and choice of viewing time than its pay-per-view predecessor. VOD also provides VCR-like pause and rewind capabilities, unlike pay-per-view which is cablecast from beginning to end, the same to each home. Some cable operators are opting to offer video-on-demand via the subscription model ("SVOD"). In the SVOD model, the subscriber pays one monthly fee for unlimited access to a finite library of select programming. This model more closely resembles the premium service (or pay-TV) tier.

127. In addition, satellite radio became available in 2001, providing subscribers over 100 channels of commercial-free, digital audio.[254] As of April 2003, there were over 500,000 subscribers to satellite radio.[255]

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[254] XM Satellite Radio, Inc., *XM Tops One-Half Million Subscriber Mark*, (press release) (Apr. 14, 2002); Sirius Satellite Radio, *Overview*, at http://www.siriusradio.com (visited May 1, 2003).

[255] XM Satellite Radio, Inc., *supra*.

128. In short, there are far more types of media available today, far more outlets per-type of media today, and far more news and public interest programming options available to the public today than ever before. Although many of these new outlets are subscription-based (e.g., non-broadcast networks available over cable and DBS, Web content available via a subscription Internet connection), the competitive pressure placed upon free, over-the-air media has led to better quality and in some cases, an increase in the quantity of some types of content. In the next five to ten years, we expect more free, over-the-air content to become available as new technologies (i.e., digital transmission) are applied to these traditional media (i.e., broadcast television).

V. LOCAL AND NATIONAL FRAMEWORK

129. We adopt herein limits both for local radio and local television station ownership. Both of these rules are premised on well-established competition theory and are intended to preserve a healthy and robust competition among broadcasters in each service. As explained below, however, because markets defined for competition purposes (*i.e.*, defined in terms of which entities compete with each other in economic terms) are generally more narrow than markets defined for diversity purposes (*i.e.*, defined in terms of which entities compete in the dissemination of ideas), our ownership limits on radio and television ownership also serve our diversity goal. By ensuring that several competitors remain within each of the radio and television services, we also ensure that a number of independent outlets for viewpoint will remain in every local market, thereby ensuring that our diversity goal will be promoted. Further, though, because local television and radio ownership limits cannot protect against losses in diversity that might result from combinations of different types of media within a local market, we adopt below a set of specific cross-media limits.

130. Similarly, by virtue of the staff's extensive information gathering efforts and the voluminous record assembled in this rulemaking docket, we have for the first time substantial evidence regarding the localism effects of our national broadcast ownership rules. We can, therefore, with more confidence than ever, establish a reasonable limit on the national station ownership reach of broadcast networks. We continue to prohibit a combination between two of the largest four networks primarily on competition grounds, but the beneficial effects of this restriction also protect our interest in preserving localism. In combination, our new national broadcast ownership reach cap and our "dual network" prohibition will ensure that local television stations remain responsive to their local communities.

131. In sum, the modified broadcast ownership structure we adopt today will serve our traditional goals of promoting competition, diversity, and localism in broadcast services. The new rules are not blind to the world around them, but reflective of it; they are, to borrow from our governing statute, necessary in the public interest.

VI. LOCAL OWNERSHIP RULES

A. Local TV Multiple Ownership Rule

132. The current local TV ownership rule allows an entity to own two television stations in the same DMA, provided: (1) the Grade B contours of the stations do not overlap; or (2) (a) at least one of the stations is not ranked among the four highest-ranked stations in the DMA, and (b) at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the proposed combination ("top four-ranked/eight voices test").[256] Only those stations whose Grade B signal contours overlap with the Grade B contour of at least

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[256] 47 C.F.R. § 73.3555(b); *Local TV Ownership Report and Order*, 14 FCC Rcd at 12907-08 ¶ 8.

one of the stations in the proposed combination are counted as voices under the rule.[257]

133. Having examined the competitive impact of other video programming outlets on television broadcast stations, we conclude, in light of the myriad sources of competition to local television broadcast stations, that our current local TV ownership rule is not necessary in the public interest to promote competition. We also conclude from our review of the record that media other than television broadcast stations contribute to viewpoint diversity in local markets. Because our current local TV ownership rule is premised on the notion that only local TV stations contribute to viewpoint diversity and does not account for the contributions of other media, we conclude the current rule is not the best means to promote our diversity goal. Moreover, we conclude that retaining our current rule does not promote, and may even hinder, program diversity and localism. However, we find that some limitations on local television ownership are necessary to promote competition. Accordingly, pursuant to the directive of Section 202(h), we herein modify our local TV ownership rule.

134. Our modified local TV ownership rule will permit an entity to have an attributable interest in two television broadcast stations in markets with 17 or fewer television stations; and up to three stations in markets with 18 or more television stations. To further ensure that no single entity possesses excessive market power, however, we will prohibit combinations which would result in a single entity acquiring more than one station that is ranked among the top four stations in the market based on audience share. As a result, no combinations will be permitted in markets with fewer than five television stations. Because we have determined that Nielsen DMAs are the relevant geographic market, common ownership of stations in the same market will be subject to this standard

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[257] *Local TV Ownership Recon. Order*, 16 FCC Rcd at 1072-73 ¶¶ 16-18.

without regard to whether the affected stations have overlapping contours, and we eliminate the provision of our local TV ownership rule that permits same-market combinations where there is no Grade B contour overlap. We also modify our existing standard for waiver of the local TV ownership rule.

135. *Background.* The Commission adopted a rule prohibiting common ownership of two TV stations with intersecting Grade B contours in 1964.[258] The rule was based in part on the Commission's earlier "diversification of service" rationale, which reflected the belief that diversity concerns were best promoted by a multiplicity of separately owned outlets.[259] In 1996, Congress directed the Commission to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market."[260] The Commission revised the rule to its current form in 1999, citing as reasons the growth in the number and variety of local media outlets and the efficiencies and public service benefits that can be obtained from joint ownership.[261] The Commission also sought to "facilitate further development of competition in the video marketplace and to strengthen the potential of broadcasters to serve the public interest."[262]

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[258] *1964 Media Ownership Report and Order*, *supra* note 56.

[259] *Genesee Radio Corp.*, *supra* note 88.

[260] 1996 Act, § 202(c)(2).

[261] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12930-31 ¶¶ 57-58.

[262] *Id.* at 12903 ¶ 1. The Commission made relatively minor changes to the rule on reconsideration. *See Local TV Ownership Recon. Order*, *supra* note 96.

136. In *Sinclair Broadcast Group, Inc. v. FCC*,[263] the court reviewed the Commission's decision modifying the local TV ownership rule.[264] The court held that there was a rational relationship between the rule and our diversity and competition goals. The court noted that choosing the number eight and defining voices "are quintessentially matters of line drawing invoking the Commission's expertise in projecting market results," and did not decide the issue of whether eight is the appropriate numerical limit. The court invalidated, however, the Commission's definition of voices under the rule because it did not adequately explain its decision to include only broadcast television stations as voices. The court pointed out that the definition was inconsistent with the definition of voices for the radio/TV cross-ownership rule,[265] which also considers major newspapers and cable television to be voices. The court observed that "[o]n remand, the Commission conceivably may determine to adjust not only the definition of 'voices' but also the numerical limit."[266]

1. The Current Rule Cannot be Justified Under Section 202(h)

137. Under Section 202(h), we consider whether the local TV ownership rule continues to be "necessary in the public interest as a result of competition." Our *Notice* sought comment on this issue, including the following specific questions: (a) whether the rule presently serves its original purposes of furthering diversity and facilitating competition in the marketplace; (b) whether the rule promotes other policy goals discussed in the *Notice*; and (c) whether, if the rule serves

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[263] *See Sinclair*, *supra* note 7.

[264] In *Sinclair*, the court reviewed challenges to the local TV ownership rule as well as to grandfathering provisions related to local marketing agreements. *Id.* 284 F.3d at 162.

[265] 47 C.F.R. § 73.3555(c)(iii, iv).

[266] *Sinclair*, 284 F.3d at 162.

some of our purposes and disserves others, the balance of its effects argues for keeping, revising, or eliminating the rule.[267]

138. Commenters proposing repeal or relaxation of the rule believe that the rule is not necessary in the public interest to achieve its intended competition and diversity goals.[268] They assert that, to the contrary, the rule is harming competition by preventing broadcasters from achieving efficiencies that will allow them to compete more effectively with other media outlets, including video programming available via cable, DBS, home video, and video rentals, as well as other media such as radio, digital audio radio service ("DARS"), newspapers and the Internet. These commenters contend that the current rule, by focusing solely on competition among local television broadcast stations, fails to account for today's competitive media marketplace.[269] They likewise contend that in light of the broad range of media options available to the public, the rule is no longer necessary in the public interest to promote our diversity goal.[270] These commenters argue that if the rule is

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[267] *Notice*, 17 FCC Rcd at 18528 ¶ 75.

[268] Alaska Comments at 3; Statement of Victor B. Miller IV, Senior Managing Director, Bear, Stearns & Co. at FCC Field Hearing on Media Ownership (Feb. 27, 2002) at 5 ("Bear Stearns En Banc Statement"); Block Comments at 5; Bonneville Comments at 5; Coalition Broadcasters Comments at 11-13; Emmis Comments at 14; Fox Comments at 3-5; FMBC Comments at 1-2; Gannett Comments at 21-28; Granite Comments at 11-12; Gray Comments at 16; NAB Comments at I, 5-6; Nexstar Comments at 16; Paxson Comments at 4; Sinclair Comments at 20-21.

[269] Alaska Comments at 4-5, Bear Stearns En Banc Statement at 1, 5; Belo Comments at 14, 25; Coalition Broadcasters Comments at 4-6; Duhamel Comments at 5-6; Emmis Comments at 31-33; Fox Comments at 3, 6; Gray Comments at 6-16; Granite Comments at 3-6, 8-10; Hearst-Argyle Reply Comments at 2-6; Media General *et al*. Comments at 3-7; NAB Comments at 8-14; Nexstar Comments at 13-18; Pappas Comments at 12-14; Paxson Comments at 5-6, 29-30; Sinclair Comments at 8-19.

[270] Alaska Comments at 4-5, Bear Stearns En Banc Statement at 5, Belo Comments at 12-19; Coalition Broadcasters Comments at 4-8; Duhamel Comments at 7; Emmis Comments at 25-30; Fox Comments at 33-34; Gray

relaxed or repealed, single owners of multiple television broadcast outlets will have an equal or enhanced incentive and ability to offer programming that is diverse in terms of both viewpoint and program format.[271] Finally, these commenters contend that the current rule does not promote localism. Rather, they contend that the rule is harming localism by preventing combinations that would yield efficiencies that would expand local news offerings and other programming relevant to the needs and interests of viewers in local markets.[272]

139. Commenters who urge us to retain the current rule assert that relaxation of the rule will harm competition, diversity, and localism.[273] These commenters contend that competition will be harmed because non-consolidated broadcasters will face anticompetitive behavior from broadcasters who own more than one station within a local market.[274] They assert that there is a clear connection between

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Comments at 6-15; Granite Comments at 10-11; Hearst-Argyle Reply Comments at 8-9; Media General *et al.* Comments at 7; NAB Comments at 15-18; Nexstar Comments at 6-13; Pappas Comments at 12-15; Paxson Comments at 27-29; Sinclair Comments at 20-37.

[271] Alaska Comments at 6; Bear Stearns En Banc Statement at 5; Belo Comments at 22-24; Coalition Broadcasters Comments at 6-7; Duhamel Comments at 6-7; Fox Comments at 30-32; Gray Comments at 17; Granite Comments at 14; Hearst-Argyle Reply Comments at 7-8; Media General *et al.* Comments at 2; NAB Comments at 36-37; Nexstar Comments at 10, 13; Pappas Comments at 14; Sinclair Comments at 16-18, 26-27.

[272] Alaska Comments at 5-6; Bear Stearns En Banc Statement at 5; Belo Comments at 12; Coalition Broadcasters Comments at 4-5; Fox Comments at 35-41; Gray Comments at 16-19; Granite Comments at 3-7; Media General *et al.* Comments at 5, 7; NAB Comments at 40; Paxson Comments at 28; Sinclair Comments at 30, 54.

[273] AFL-CIO Comments at 49; AFTRA Comments at 3, 14; CFA Comments at 184; CWA Comments at ii, 16; Children Now Comments at 11-12, 18, 23; Entravision Comments at 3-8; UCC Comments at 39-41.

[274] AFL-CIO Comments at 31; AFTRA Comments at 3, 25-26; CFA Comments at 186-187. Entravision makes a similar assertion, although it

ownership and viewpoint diversity because owners can and do express viewpoints through their editorial control over what is aired.[275] They urge us to retain the current rule in order to promote the public's First Amendment interest in a robust marketplace of ideas, and to protect the viewpoint diversity that they state is critical to ensuring an informed electorate.[276] They also contend that further consolidation in local television markets will result in less local control over programming.[277] We address each of these arguments below in our analysis of whether the current rule remains necessary in the public interest as required by section 202(h).

a. Competition

140. We conclude that the current local TV ownership rule is not necessary to protect competition. By limiting common ownership of television stations in local markets where at least eight independently owned TV stations would remain post-merger, the current rule prohibits mergers that would increase efficiency in small and mid-sized markets—mergers that would thereby promote competition. In addition, by limiting common ownership to no more than two television stations, the current rule prohibits efficiency enhancing mergers in the largest markets. The current rule also prohibits mergers among the top four-ranked stations.[278] After reviewing all of the record

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does not take a position on whether to relax the local ownership rule. Entravision Comments at 6-10. Instead, Entravision proposes that we address anticompetitive conduct by establishing certain other requirements. *Id.*

[275] AFL-CIO Comments at 15-25; AFTRA Comments at 11-14; CFA Comments at 263; CWA Comments at 28-32; UCC Comments at 4-9.

[276] AFL-CIO Comments at 3, 5-9; AFTRA Comments at 11; CFA Comments at 30-32; CWA Comments at 1-3; UCC Comments at 61-64.

[277] AFL-CIO Comments at 51-53; AFTRA Comments at 10-12; CFA Comments at 250-252; CWA Comments at 30-32; Children Now Comments at 12; UCC Comments at 12-17.

[278] "The 'top four-ranked station' component of this standard is designed to

evidence, we conclude that this restriction remains necessary to promote competition, so we are retaining a prohibition on mergers of the top four-ranked stations in the modified local TV ownership rule we are adopting today. Today's decision benefits from numerous empirical studies that provide a wealth of competition information not previously available.[279]

141. In the *Notice*, we requested comment on the definition of the product and geographic markets in which broadcast television stations compete. Based on the record, we conclude that broadcast television stations operate in three product markets: a market for delivered video programming ("DVP"); a video advertising market; and a video program production market.[280] Although each of these markets is discussed below, our primary concern is promoting competition for viewers. Therefore, we will focus on competition in the DVP market. It is this market that directly affects viewers. The advertising market and the program production market are of concern to the Commission only to the extent that protecting competition in these markets may add an extra level of protection for the public and enable all television broadcasters to compete fairly for advertising revenue and programming. What is critical to our competition policy goals, however, is the assurance of a sufficient number of strong rivals actively engaged in competition for viewing audiences. As long as there are

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ensure that the largest stations in the market do not combine and create potential competition concerns. These stations generally have a large share of the audience and advertising market in their area, and requiring them to operate independently will promote competition." *Local TV Ownership Report and Order*, 14 FCC Rcd at 12933-34 ¶ 66.

[279] *See, e.g., Id.* at 12918 ¶ 31. ("We are aware of no definitive empirical studies that quantify the extent to which the various media are substitutable in local markets.").

[280] Fox Comments, Exhibit 3, Bruce M. Owen, *Statement on Media Ownership Rules* (Jan. 2003) at 1-2 ("Fox Comments, Owen Statement").

numerous rival firms in the DVP market, viewers' interests will be advanced. We first analyze the DVP market.

(i) The DVP Market

142. The evidence in the record suggests that television viewers do not consider non-video entertainment alternatives (*e.g.*, reading and listening to music) and non-delivered video (*e.g.*, VCRs/DVDs and movie theaters) to be good substitutes for watching television.[281] In defining the market, we follow the *DOJ/FTC Merger Guidelines* and ask whether the availability of entertainment alternatives is sufficient to prevent a significant and non-transitory increase in price. If they were good substitutes to watching television, relative changes in prices or other competitive variables should change household consumption of television.[282] The record evidence suggests, however, that, while the price of subscribing to cable and DBS has increased faster than the rate of inflation, these price increases have not resulted in households dropping their subscriptions to cable and DBS,[283] or reducing the amount of

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[281] In defining the relevant product market for merger analysis, one starts with the products supplied by the merging firms and asks whether a monopolist, supplying those products, would profitably impose "a small but significant and non-transitory price increase." If the monopolist would not be able to impose such a price increase, then one adds in the next closest substitute to the products of the merging firms and repeats the experiment. Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, at http://www.usdoj.gov/atr/hmerger/11256.htm (visited Mar. 20, 2003). This approach has been referred to as the "smallest market principle."

[282] Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission, 57 Fed. Reg. 41552 (dated Apr. 2, 1992, revised, Apr. 8, 1997) ("*DOJ/FTC Merger Guidelines*"). Section 1.11 of the *DOJ/FTC Merger Guidelines* states: "In considering the likely reaction of buyers to a price increase, the Agency will take into account all relevant evidence, including, but not limited to, the following: (1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables..."

[283] Over the past several years, despite the fact that prices for MVPD

time households spend watching television. In fact, the amount of time households spend watching DVP on television has remained unchanged for 30 years.[284] Thus, DVP providers have indeed been able to impose non-transitory price increases. This suggests that the relevant product market is no broader than DVP and should not include all entertainment activities.

143. For most viewers the programming choices offered by local broadcast television stations and cable networks represent good alternatives for one another. Most households subscribe to cable or DBS and receive DVP from cable networks and local broadcast television stations.[285] These viewers need only touch their remote control to switch between the programming offered by cable networks and that of local broadcast television

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service, particularly cable, have increased significantly, the percentage of households subscribing to such service also has increased. *See, 2002 Video Competition Report*, *supra* note 98. *See also Reports*, 1994-2001: *1994 Video Competition Report*, *supra* note 138; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060 (1996) (*"1995 Video Competition Report"*); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd 4358 (1997) (*"1996 Video Competition Report"*); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd 1034 (1998) (*"1997 Report"*); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd 24284 (1998) (*"1998 Video Competition Report"*); and *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 15 FCC Rcd 978 (2000) (*"1999 Video Competition Report"*); *2000 Video Competition Report*, *supra* note 223; *2001 Video Competition Report*, *supra* note 239.

[284] Adults spent 46.5 percent of their total leisure time watching television in 1970 and 46.1 percent in 2000. Harold L. Vogel, ENT. INDUS. ECON.: A GUIDE FOR FINANCIAL ANALYSIS (5th Ed) at 9. The 46.1 percent statistic includes time spent watching network affiliates, independent stations, basic cable programs and pay cable programs. It does not include non-delivered video such as movie theaters, video tapes, and video games.

[285] Our most recent Annual Video Competition Report found that 85.25% of all U.S. television households subscribe to an MVPD. *See 2002 Video Competition Report*, 17 FCC Rcd 26901 at Appendix B, Table B-1.

stations. The ease of switching from broadcast to cable networks for these households provides strong incentives for cable networks and local broadcast television stations to provide programs that attract viewers. The owners of cable networks and local broadcast television stations know that anything that reduces a program's appeal will cause cable and DBS subscribers to switch to programming offered by other cable networks or broadcast stations.[286] As such, all the broadcast television stations and cable networks available to a significant number of cable subscribers in a DMA should be included as participants in the market for DVP.

144. The programming quality delivered to the minority of households that do not subscribe to cable or DBS is protected by the majority of households that do subscribe. Although non-subscribing households have fewer program choices than subscribing households, broadcasters cannot reduce the viewer appeal of their programming to non-subscribing households, without also reducing the viewer appeal of their programming to subscribing households. Broadcasters deliver the same programming to both subscribing and non-subscribing households. Thus, the majority of households that subscribe to cable or DBS assure that non-subscribing households receive appealing programming.

145. Although viewers easily switch between the programming offered by broadcast television stations and the programming offered by cable networks, broadcast television stations and cable networks may respond differently to changes in local market concentration. Therefore, in formulating our revised local broadcast television ownership rules, we continue to draw a distinction between television broadcast stations and

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[286] The analytical approach of the *DOJ/FTC Merger Guidelines* "begins with a focus on consumers. Whether a proposed merger or acquisition is anticompetitive is determined in part by asking what alternatives are, or would be, available to customers in the event that prices increase-or service deteriorates." Fox Comments, Owen Statement at 2-3.

cable networks. Because cable networks typically offer national programming nationwide, they have incentives to respond to conditions in the national market. It is unlikely that mergers between broadcast television stations in any local market would alter the competitive strategy of a national cable network. In contrast, local broadcast television stations offer a mix of national programming and local programming in a geographic area typically no larger than a DMA. As such, local broadcast television stations have incentives to respond to conditions in local markets. It is the unilateral and coordinated responses of local broadcast television stations to mergers between local broadcast television stations that may result in potential competitive harms. Thus, we focus on ownership of television broadcast stations, not cable networks, to promote competition in local television markets.

(a) Geographic Market for DVP

146. As we evaluate the competitive effects of mergers between local broadcast television stations, we must define the relevant geographic market for the DVP market. Generally, cable systems carry all the broadcast stations assigned to the DMA in which they are located, pursuant to our must-carry/retransmission consent requirements.[287] Cable systems providing service to the majority of households also carry most major cable networks. As such, the relevant geographic market for DVP is the DMA for most mergers between local broadcast television stations.

(b) Efficiencies of Common Ownership of Television Broadcast Stations in DVP Markets

147. We recognize that common ownership of stations may result in consumer welfare enhancing efficiencies. First,

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[287] *See* 47 C.F.R. § 76.55(b)-(e) (defining local noncommercial educational television station, local commercial television station and television market for purposes of signal carriage obligations); 47 C.F.R. § 76.56 (signal carriage obligations).

common ownership of broadcast television stations in a local market can facilitate efficiencies and cost savings.[288] Joint operations can eliminate redundant studio and office space, equipment, and personnel, and increase opportunities for cross-promotion and counter-programming.[289] Our current rule hinders the realization of efficiencies by prohibiting common ownership of television stations in most DMAs. To enhance the ability of broadcast television to compete with cable and DBS in more DMAs, we believe that the potential efficiencies and cost savings of multiple station ownership should be available to stations in a larger number of DMAs than permitted by our current rule.[290]

148. Common ownership of broadcast television stations in a local market may also spur the transition to digital television. The DTV transition is a government-mandated undertaking designed to achieve several important goals, including: (1) the preservation of free, universally available local broadcast television in a digital world; and (2) the promotion of spectrum efficiency and the rapid recovery of spectrum for other uses.[291] In developing DTV build-out rules for broadcast stations, the Commission has recognized the particular financial challenges faced by stations in smaller markets.[292] Nevertheless, many

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[288] Randy Falco, President of NBC Television Network, argues that broadcasters have large sunk costs in programming and ownership of multiple stations at the local level enables broadcasters to amortize programming costs across more platforms. Bear Stearns Comments at 208-09.

[289] Sinclair Comments at 16, Exhibit 8 at 30-31.

[290] Alaska Comments at 3-4. Alaska contends that the current rule gives relief to large market broadcasters but denies the benefits of common ownership to small market broadcasters. *See also*, Granite Comments at 14; Gray Comments at 17; and Nexstar Comments at 20-22.

[291] *See, e.g., Advanced Television Systems and Their Impact Upon the Existing Broadcast Service*, 12 FCC Rcd 12809, 12811-12 ¶¶ 5-6 (1997) ("*Fifth Report and Order*").

[292] *See Review of the Commission's Rules and Policies Affecting the*

DTV construction costs do not vary with market size and thus it still may be relatively more difficult for stations in these markets to finance the transition to DTV.[293]

149. We believe that our modified rule, which permits the common ownership of at least two television stations in most markets, will have a beneficial impact on the DTV transition. One study shows that stations that are commonly owned and stations involved in joint operating arrangements are further along in the DTV transition.[294] Common ownership could facilitate cost savings by sharing DTV equipment (e.g., towers, production equipment) and engineering personnel. Common ownership would also allow the expertise gained in transitioning one station to DTV to be transferred to other commonly owned stations.

150. Our competition goal seeks to ensure that for each television market, numerous strong rivals are actively engaged in competition for viewing audiences. Although mergers among participants in the DVP market would not affect the number of delivered video program streams, they might adversely affect the types or characteristics of the programming offered by the merged entities to the detriment of viewers. Audience share data, however, reveals that common ownership of two broadcast television stations has generally improved audience ratings.[295] That is, the evidence we have for common

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Conversion to Digital Television, 16 FCC Rcd 20594 (2001) (permitting stations in markets beyond the top thirty markets initially to come on the air with lower-powered – and therefore less expensive – facilities, to operate at a reduced schedule, and to file for extensions of time to construct based on financial hardship); *Fifth Report and Order*, 12 FCC Rcd at 12842 ¶ 78 (adopting staggered construction schedule to help reduce costs for smaller market stations and permit them to learn from the experience of stations in larger markets).

[293] Media General *et al.* Comments at 5.

[294] Coalition Broadcasters Comments, Appendix B, *Study of DTV Rollout by Smaller Stations in Markets 51-100.*

[295] *Id.*, Attachment A: *Television Local Marketing Agreement and Local*

ownership of two television stations suggests that more viewers prefer the post-merger programming. We therefore conclude that our current rule, which prohibits common ownership of broadcast television stations in most markets, is overly restrictive. Because some relaxation of the current rule to permit additional consolidation in local television markets would facilitate efficiencies and likely result in the delivery of programming preferred by viewers, we conclude that our current rule cannot be justified on grounds of competition in the market for DVP.

(ii) Video Advertising Market

151. We conclude that the current rule is not necessary to promote competition in the video advertising market. We are concerned with competition in the broadcast television advertising market only to the extent that it adds an extra level of protection to viewers and enables broadcasters to compete for advertising revenue. We conclude that our local TV ownership rule restricts many broadcasters to suboptimal size and, therefore, hinders their ability to compete with other media for advertising revenue. That said, competitive broadcast television advertising markets may require a larger number of owners of DVP than are necessary to protect competition in the DVP market. As such, assuring competition in video advertising markets may provide the public with an added level of protection. A larger number of television station owners in a local television market may also lower the potential for the exercise of market power by any one broadcaster and, therefore, help smaller or non-consolidating broadcasters compete for advertising revenue.

Duopolies: Do They Generate New Competition and Diversity? Mark R. Fratrik, BIA Financial Network (Jan. 2003). Fratrik evaluated the performance of LMA or co-ownership operations involving LIN Television and Raycom Media, and other local television stations in seven markets and determined that in all markets, these arrangements led to significant increases in both audience share and advertising revenue.

152. We have determined that broadcast television advertising is a relevant product market. Advertisers differ in their ability to substitute between alternative media. Although some advertisers that use broadcast television stations may consider cable networks or the advertising time sold by local cable operators to be good substitutes, other advertisers may not consider these alternatives to be good substitutes.[296] In addition, most advertisers that use broadcast television stations do not consider radio, newspapers, and other non-video delivery media to be good substitutes.[297] We disagree with studies suggesting that broadcast television is not a relevant

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[296] David Barrett, President and Chief Executive Officer of Hearst-Argyle Television, Inc., argues that over-the-air television stations have the most popular programs and can aggregate the largest audience. When it comes to attracting advertisers, Mr. Barrett maintains that broadcast television stations have absolute advantages over niche boutique cable network offerings. Bear Stearns Comments at 26.

[297] MOWG Study No. 10, *On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales* by Anthony C. Bush (Sept. 2002) ("MOWG Study No. 10").(finding weak substitutability between local television and local radio and weak substitutability between local television and local newspapers); Fox Comments, Owen Statement at 12 (asserting that merger enforcement in the media has tended to focus on rather narrow advertising markets, that DOJ excludes television and newspaper advertising as alternatives to radio when considering the advertising market definition in radio station mergers, and that DOJ has similarly rejected television and radio advertising as alternatives for newspaper advertisers when considering newspaper mergers); IPI Comments, Appendix A (finding no responsiveness of local cable television advertising rates to changes in local broadcast television advertising rates). The findings of IPI's study suggest that cable may have market power over some local advertisers. IPI's study does not, however, address the issue of whether consolidation of broadcast television stations in a local market could have market power. *See also* Bear Stearns Comments at 88-89 (Jeff Smulyan, Chairman, Emmis Corporation asserts that the audience most targeted by advertisers (18 to 34 year-olds and 18 to 49-year olds) are not reading daily newspapers anymore, which gives broadcast television an advantage).

product market.[298] A critical failing of these studies is the assumption that any exercise of market power would result in a general and uniform price increase to all advertisers. These studies argue that a significant number of advertisers have good substitutes for broadcast television and could defeat a general and uniform price increase. These studies fail to recognize that media markets are characterized by repeated interaction that enables broadcasters to identify advertisers that have good substitutes for broadcast television and those that do not have good substitutes for broadcast television. With this information, the exercise of market power in broadcast television markets would result in targeted and non-uniform price increases to those advertisers that do not have good substitutes for broadcast television, without raising prices for those advertisers that do have good substitutes for broadcast television.[299]

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[298] Crandall contends that his results suggest that television broadcast is not its own product market. Sinclair Comments, Exhibit 1, *The Economic Impact of Providing Service to Multiple Local Broadcast Stations Within a Single Geographic Market*, Robert W. Crandall, at 23 ("Sinclair Comments, Crandall Statement"). Baumann and McAnneny contend that the relevant product market is broader than broadcast television advertising and includes cable television, radio, newspaper, outdoor, and direct mail. Sinclair Comments, Exhibit 8, *Analysis of the Competitive Effects of an LMA between WTTE-TB and WSYX-TV in Columbus, Ohio*, Michael G. Baumann and Joseph W. McAnneny (Aug. 28, 1997) at 20 ("Sinclair Comments, Baumann/McAnneny Statement").

[299] Sinclair Comments, Baumann/McAnneny Statement at 28-30. Baumann and McAnneny maintain that price discrimination is unlikely because: (1) broadcasters would have to make educated guesses to identify price-insensitive advertisers, (2) advertisers that consider broadcast television an essential outlet have an incentive to disguise their preferences, and (3) advertisers could use media buyers and advertising agency representatives that are able to compare rates and resist attempts to charge greatly disparate rates for similar spots. *Id.* Baumann and McAnneny do not explain how hiring an advertising agency prevents price discrimination. We are not persuaded. Broadcasters make repeated sales, have a keen understanding of the price-sensitivities of advertisers, and can identify advertisers that

153. Our experience suggests, however, that common ownership of two local broadcast television stations has produced efficiencies without facilitating the exercise of market power in the broadcast television advertising market. Two studies in the record evaluate the impact of consolidation on advertising prices. One study indicates that local broadcast advertising prices are not significantly higher for stations owned or operated by single entity.[300] Another study examines market structure in the Columbus, Ohio, DMA following a broadcast television local marketing agreement ("LMA")[301] combination in the market and concludes that the LMA is unlikely to result in any competitive harm to local advertisers.[302] The data for these studies were based on the common operation of two broadcast television stations in the same market. In light of this evidence, and evidence cited above that the current rule prohibits some consumer welfare enhancing combinations, we conclude that the current rule is overly restrictive and not necessary to protect competition in the broadcast television advertising market.

(iii) Video Program Production Market

154. We conclude that the current rule is not needed to protect competition in the video program production market. Broadcast television stations, along with TV networks, cable networks, program syndicators, and cable and DBS operators purchase or barter for video programming. The channel

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consider television an essential buy. We conclude that a broadcaster with market power could raise prices to these advertisers.

[300] Sinclair Comments, Crandall Statement at 27. Using data from Sinclair, Crandall performs an econometric analysis of 58 stations in 38 DMAs.

[301] An LMA or a time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot advertisements that support the programming. *See Local TV Ownership Report and Order*, 14 FCC Rcd at 12958 ¶ 126; 47 C.F.R. § 73.3555, Note 2(j) (2002).

[302] Sinclair Comments, Baumann/McAnneny Statement at 2.

capacity of today's cable operators and DBS operators provides many more opportunities for sellers of existing and new video programming, compared with 20 years ago.[303] Many of the programs sold today are specifically targeted to the niche audiences available on cable networks. In addition, many video programs initially sold to TV networks migrate to cable networks, and a few programs initially sold to cable networks migrate to local broadcast television stations. Same-market combinations are only of concern to the few program syndicators that sell their programming directly to individual local television stations. These program syndicators would not consider sales to group owners of television stations in multiple markets, TV networks, and cable networks to be good substitutes for the sale of programming to individual stations. These program syndicators play one television broadcast station against another in the same market to sell their programming. By precluding common ownership of broadcast television stations in most markets, our current rule provides for more owners of television broadcast stations in most markets than are necessary to assure that program syndicators receive a fair price for their programming.[304] We conclude, therefore, that the current rule is not necessary to protect competition in the video program production market.

b. Localism

155. The adoption of the local TV ownership rule was not predicated on promoting localism. To the contrary, the Commission has previously recognized that relaxation of the rule was likely to promote localism. Specifically, we relaxed the local TV ownership rule in 1999 on grounds that local ownership combinations were likely to yield efficiencies that "can in turn lead to cost savings, which can lead to programming and other service benefits that enhance the public

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[303] *See supra* ¶¶ 106-128.

[304] The current rule ensures that there are at least eight independent owners in all markets with eight or more stations.

interest."[305] The primary evidence of "programming and service" benefits was anecdotal evidence of increases in the amount of local news and public affairs programming aired by stations participating in LMAs.[306]

156. The *Notice* requested comment on whether and how the local TV ownership rule affects localism.[307] We asked whether the rule affects the quantity or quality of local news and other programming of local interest produced and aired by local stations, and whether it affects the local selection of news content that is aired.[308] We sought empirical data on the impact that common ownership and operation has had on the production of local programming by stations involved in such combinations or arrangements, and data on the quality of such programming.[309] We also sought comment on the costs of producing local news and public affairs programming, and the relationship of our local TV ownership rule to the viability of such programming.[310] Below, we analyze the relationship of the current rule to our policy goal of promoting localism, and examine whether modification of the rule will advance this policy goal. We conclude that our current local TV ownership rule poses a potential threat to local programming, and that modification of the rule is likely to result in efficiencies that will better enable local television stations to acquire content desired by their local audiences.

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[305] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12920 ¶ 34.

[306] *Id.* at 12921-22 ¶ 36, n.68. Most of the record evidence of the potential benefits was anecdotal and was presented by broadcasters based on their own experiences with LMAs.

[307] *Notice*, 17 FCC Rcd at 18535 ¶ 95.

[308] *Id.*

[309] *Id.* at 18535 ¶ 95-96.

[310] *Id.* at 18535 ¶ 97.

(i) Local Programming Quantity and Quality

157. Commenters advocating relaxation of the local TV ownership rule contend that if the current rule has any relationship to localism, it is to hinder the achievement of this policy goal.[311] According to these commenters, the current financial position of many television broadcasters and the high cost of producing local news and public affairs programming threatens existing local programming and precludes development of new programming.[312] These commenters contend that the current rule prohibits combinations that would result in efficiencies which would facilitate production of more local news and public affairs programming, or at least protect current local news operations.[313] In support of these arguments, commenters provide persuasive anecdotal and empirical evidence of how LMA and duopoly combinations have improved local coverage,[314] and some evidence of the rising costs of local news operations.[315]

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[311] Sinclair Comments at 29-31; Media General *et al.* Comments at 5; Duhamel Comments at 5-6. Several commenters state that our localism policy is unrelated to ownership rules. They contend that localism is an obligation of all broadcast licensees that is enforced through our licensing and license renewal processes. *See* Nexstar Comments at 18-20; Gray Comments at 16; Sinclair Comments at 30-31.

[312] Alaska Comments at 6; Belo Comments at 25; Coalition Broadcasters Comments at 4-7; Granite Comments at 6-7; Gray Comments at 16-18; NAB Comments at 75-77.

[313] Alaska Comments at 5-6; Coalition Broadcasters Comments at 4; Duhamel Comments at 6; Granite Comments at 7; Gray Comments at 15-16; Hearst-Argyle Comments at 8-9; Media General, *et al.* Comments at 5; NAB Comments at 78.

[314] Belo Comments at 22-24; Coalition Broadcasters Comments at 16-33; Fox Comments, Economic Study B, *Effect of Common Ownership or Operation on Television News Carriage, Quantity and Quality* ("*Fox News Study*"); Nexstar Comments at 2-6.

[315] NAB Comments, Attachment D, *Newsroom Budgets in Midsize and Small Markets*, prepared for NAB by Smith Geiger, LLC ("*NAB Newsroom Costs Study*"); NAB Comments, Attachment C, *The Declining Financial*

158. On the other hand, commenters opposing modification of the rule assert that concentration within local markets impedes localism, as evidenced by sharing of news resources and one case of reduced local news offerings following the establishment of a same-market television combination. Some of these commenters anticipate that modification of the local television ownership rule will lead to television programming that is less responsive to local needs based on their observations of how radio consolidation has affected local programming.[316] In support of their contentions, these commenters provide examples of how combinations have harmed local news and public affairs programming.[317] The few examples provided, however—especially those that are borrowed from the newspaper or radio contexts—do not persuade us that local combinations of television stations will harm localism.

(a) Empirical Evidence

159. An empirical study of the effects of common ownership or operation on local news quantity and quality provides some evidence that stations that are commonly owned or operated are more likely to offer local news than independently owned stations. The study submitted by Fox ("News Study") examined the news offerings of all full-power commercial

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Position of Television Stations in Small and Medium Markets ("NAB Comments, Small to Medium Markets Statement").

[316] AFL-CIO Comments at 27-30; AFTRA Comments at 12-14, 33-35; CFA Comments at 250-260; CWA Comments at 29, 32, 40-42; UCC Comments at 16, 51-52.

[317] Although they offered anecdotal evidence, commenters who urge us to retain the current rule did not provide empirical data concerning the effects of same-market local TV combinations on local news and public affairs programming. PEJ provided an empirical study that analyzed the effects on local news of the following factors: size of a station group (*i.e.*, across all markets), network affiliation, cross-ownership of other media, or ownership by an entity with corporate headquarters in the market. Thus, the study did not analyze the effects on local news of common ownership of more than one television station in a market.

television broadcast stations, comparing the quantity and quality of local news offerings of stations that are part of a commonly owned/operated pair with those of other stations.[318] The News Study found that stations that are part of a commonly owned local station group or LMA are significantly more likely to carry local news than other stations, even controlling for other factors. The study also found that the total minutes of local news carried by commonly owned or operated stations is similar to the total minutes of local news carried by other stations, as is the quality of the news programming as measured by the number of news awards the stations receive. The study considered whether stations that compete with same-market combinations increase or reduce the amount of local news they air in response to the presence of the same-market combination, and found that the presence of a combination had no statistically significant effect on the amount or quality of news programming available in the DMA, after controlling for other factors.[319]

(b) Anecdotal Evidence

160. Broadcasters provide persuasive anecdotal evidence in support of their claims that same-market combinations have resulted in efficiencies that produce public interest benefits. Belo states that its acquisition of a second station in the Seattle, Washington, DMA has resulted in an extra hour of news programming,[320] and has allowed Belo to devote more resources to public affairs programming.[321] Belo's second station in Spokane, Washington, recently began airing local news,[322] and a recently acquired second station in Tucson,

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[318] *Fox News Study* at 3.

[319] *Id.* at 2.

[320] Belo Comments at 22-23. The stations share news staff but have separate news producers.

[321] *Id.*

[322] *Id.* at 23. Although the news is co-produced with its duopoly pair, the station airs its news at a different time and has its own anchor and news

Arizona, will soon begin to air a local newscast.[323] Nexstar states that local news and public affairs programming has increased as a result of its LMAs in various markets,[324] including, for example, tripling the news coverage in Bloomington, Illinois, from one crew to three crews;[325] starting the market's only 9:00 PM newscast;[326] reinstating local sports programming;[327] and producing and airing a new local public affairs program.[328]

161. Coalition Broadcasters point to similar public interest benefits resulting from their same-market combinations.[329] At one station that is part of an LMA, efficiencies allowed for an increase in the number of employees devoted to producing news and the expansion of the station's local news from six hours per week in 1994 to 19.5 hours per week today.[330] Another station did not offer any regular local news or sports coverage and provided little other local program service prior to entering into an LMA, which later became a duopoly.[331] Today, the station broadcasts approximately 120 local university sports events annually, 60-second news briefs twice daily, five minute news briefs during university games, and a

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producer. *Id.*

[323] *Id.*

[324] Nexstar Comments at Appendix A (describing public interest benefits resulting from combinations in nine markets).

[325] *Id.* at A-1.

[326] *Id.* (describing changes resulting from an LMA in the Peoria-Bloomington, Illinois DMA).

[327] *Id.* (describing changes resulting from an LMA in the Joplin, Missouri-Pittsburg, Kansas DMA).

[328] *Id.* at A-2 (describing changes resulting from an LMA in the Wilkes Barre-Scranton, Pennsylvania DMA).

[329] Coalition Broadcasters Comments at 16-34 (describing public interest benefits resulting from seven combinations).

[330] *Id.* at 16 (describing an LMA in the Fort Myers-Naples, Florida DMA).

[331] *Id.* at 18 (describing a combination in the Honolulu, Hawaii DMA).

rebroadcast of the news of its LMA partner at a different hour.[332] The station also has aired 21 locally-produced evening specials over the past two years.[333] Operating independently, the local programming offerings of two UHF stations in Cleveland, Ohio, were scant – one hour of local news on one of the stations, and no local news on the other.[334] The stations then entered into an LMA and later became a duopoly.[335] Today, one station airs 7.5 hours of local news coverage every weekday, and the other offers one hour of news per day, as well as news breaks.[336] Fox reports that the 1999 relaxation of the local TV ownership rule allowed it to create nine combinations, which are airing an average of 6% more local news than before Fox acquired these stations.[337]

162. In support of their contention that relaxation of the local TV ownership rule has adversely affected localism, AFL-CIO and AFTRA state that "examples of the loss of local newscasts . . . as a result of media consolidation abound nationwide" but provide only three examples, two of which concern radio

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[332] *Id* at 18-20.

[333] *Id.*

[334] *Id.* at 21.

[335] *Id.*

[336] *Id.* Both stations have access to significantly improved resources and facilities for news production. Prior to the combination, the station offering news had seven videographers, 25 other staff, and a single news truck. Today, the stations boast a combined news division of 19 videographers, 73 other staff, four news trucks, sixteen cars, a helicopter, six ENG microwaves and five receive sites. *Id.* at 21-34 (describing similar public interest benefits resulting from combinations in several other markets); *See also* Statement of Edward Munson, Vice President and General Manager of WAVY(TV) and WVBT(TV) at FCC Field Hearing on Media Ownership, Feb. 27, 2002 ("LIN En Banc Statement") (describing similar public interest benefits resulting from a combination in the Richmond, Virginia DMA).

[337] Fox Comments, News Programming Exhibit 1 at 3-4. Fox states that in each case, it has owned the second station for 16 months or less. *Id.*

combinations.[338] Specifically, they state that Sinclair has announced plans to cease local production of weather reports at its two television broadcast stations in the Dayton, Ohio, DMA which now will air weather reports generated at Sinclair's Baltimore, Maryland, headquarters.[339] As these commenters recognize, Sinclair stations that are not part of combinations also will receive weather reports from corporate headquarters, so this evidence does not demonstrate that consolidation within local markets decreases local origination of weather reports or otherwise reduces local programming.[340] Rather, production of programming at a national headquarters appears to be motivated by the ability to achieve efficiencies unrelated to the number of stations Sinclair owns within a particular local market.[341] AFL-CIO and AFTRA also state that when Viacom acquired a second all-news radio station in Chicago, it shut down one of the stations, eliminating a source of local news.[342] Viacom refutes this claim, asserting that the station was not "shut down" but that its format was changed from all news to sports/talk in order to meet the desires of local audiences.[343] We do not agree that a change in format is the same as "shutting down" a station. We also do not agree that a single example of a radio station's format change can be extrapolated into a general statement about the effects of our existing local

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[338] AFL-CIO Comments at 47-49; AFTRA Comments ¶¶ 32-40.

[339] AFL-CIO Comments at 48; AFTRA Comments ¶¶ 32-40.

[340] Sinclair Reply Comments at 12 (as evidenced by its use of NewsCentral in markets in which it owns only one station, Sinclair's NewsCentral initiative has "nothing to do with duopoly").

[341] Sinclair states that its NewsCentral initiative, pursuant to which it produces news from a central location, is "intended to allow Sinclair to produce and broadcast news in a more efficient manner than is currently the case," and is not relevant to the instant proceeding. *Id.* at 6.

[342] AFL-CIO Comments at 48-49; AFTRA Comments ¶¶ 32-40.

[343] Viacom Reply Comments at 5-6.

TV rule, or a predictive statement about the likely result of modifying the rule.

163. UCC believes that the increased common ownership of stations in the same market has reduced the amount of local programming because co-owned stations consolidate staff and resources that produce local information.[344] UCC complains that, as a result of the 1999 relaxation of the local TV ownership rule, there are now at least 75 commonly owned station pairs and 20 station pairs that are part of LMAs.[345] UCC provides examples of two markets where commonly owned stations share resources,[346] and one market where a combination that once shared news resources ceased to produce local news entirely, relying on news produced by another station in the market.[347] The effects of same-market combinations on news production in just three markets are not a sufficient basis for a conclusion about the effects of some 95 same-market combinations on localism. Moreover, although the examples provided show that the subject stations no longer produce news independently, this does not necessarily translate into "less" local news.[348] The subject stations may now offer the same news at different times, which might actually expand the "amount" of news available to viewers in that market, if viewers previously unable to watch news programming can watch the news at a different time.[349] By combining resources,

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[344] UCC Comments at 39-40.

[345] *Id.*

[346] *Id.* at 40 (discussing the combined operations of two stations owned by Viacom in New York, New York and two stations owned by Fox in Los Angeles, California).

[347] *Id.* (describing a Detroit, Michigan combination owned by Viacom that now obtains news from a competitor).

[348] The production of local news by more owners relates to viewpoint diversity, not localism.

[349] According to Belo, broadcasters owning or operating same-market combinations have "strong economic incentives" to add news programming

the subject stations may also be offering more coverage of local events than before. UCC's anecdotal evidence does not address these factors.

(c) Conclusion

164. On balance, evidence presented by commenters concerning the amount and quality of local news and public affairs programming suggests that owners/operators of same-market combinations have the ability and incentive to offer more programming responsive to the needs and interests of their communities and that in many cases, that is what they do. Thus, modifications to the rule that will allow for greater common ownership are likely to advance our localism goal.

(ii) Effect of Local Market Consolidation on Local Control Over Content

165. Without linking their conclusions to a specific rule, AFL-CIO and AFTRA contend that media consolidation generally reduces local control over content and places greater control in the hands of the corporate headquarters of the entity that owns a given outlet.[350] They further state that by reducing the number of available employers at the local level, consolidation makes news professionals less likely to risk alienating their employers by challenging their demands.[351] In

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to commonly owned stations. At a minimum, such broadcasters would repurpose newscasts at staggered times to increase audience share, thereby bringing local audiences more viewing opportunities. Belo Comments at 24-25. Coalition Broadcasters assert that "even the limited consolidation achieved through existing LMAs and duopolies has enabled in-market stations to offer beneficial services such as local news and public affairs programming and other innovative services." *See* Coalition Broadcasters Comments at 6-7.

[350] AFL-CIO Comments at 51-53; AFTRA Comments ¶¶ 46-51.

[351] AFL-CIO Comments at 53; AFTRA Comments ¶ 52. They also cite a recent study showing that 41% of 300 reporters surveyed said that they had intentionally avoided newsworthy stories to benefit the corporate interests of their news organizations. AFL-CIO Comments at 52; AFTRA Comments ¶ 50 (citing Pew Research Center for People and the Press Survey (Apr. 30,

support of this, AFL-CIO and AFTRA cite their own experience in contract negotiations, which they contend are conducted by corporate, not local station representatives. They do not, however, provide any examples of negotiations, nor do they offer a comparison between negotiations with employers that own more than one station in a market and those that own single stations.[352] They state that because of a directive from a Disney CEO, the ABC network cancelled a story on Disney's hiring policies.[353] However, this example does not pertain to programming decisions of local stations, but to the programming decision of a national broadcast network. Such evidence may be relevant to whether there is a tie between ownership and the presentation of viewpoints, but does not establish a connection between local market structure and local control over content. Indeed, we have no record evidence linking relaxation of our local ownership rule to a reduction in local control over content.[354] We also have no means of measuring the extent to which news professionals' fear of retribution by their employers is reducing the ability of television broadcast stations to offer news focused on the needs and interests of their local communities, nor can we connect such concerns to our local ownership rules.

2002)). Again, such comments and findings help to establish a connection between viewpoint diversity and ownership, but they do not tell us whether the local TV ownership rule is in any way linked to journalists' reporting decisions. Commenters do not contend, nor does the cited survey find, that such results are any more or less likely in when there is greater local market concentration.

[352] AFL-CIO Comments at 51-52; AFTRA Comments ¶ 47.

[353] AFL-CIO Comments at 52; AFTRA Comments ¶ 48.

[354] Nexstar asserts that, contrary to the unsubstantiated claims of some commenters, they "actively mandate a local community focus for their stations." Nexstar Reply Comments at 6.

(iii) News Programming Costs and Viability of Local News Operations

166. Several commenters contend that the rising cost of producing news and public affairs programming is forcing broadcasters to reduce news production and that relaxation of the local TV ownership rule would allow broadcasters to invest in new local news and public affairs programming or at least to maintain existing programming.[355] Gray provides four examples of stations in smaller markets that have shut down or significantly scaled back their news operations due to financial concerns.[356]

167. NAB filed a study conducted by Smith Geiger, LLC ("Smith Geiger") examining the cost of the startup and operating costs of local news production for stations in small (ranked 101-210) and mid-sized (ranked 51-100) markets.[357] The study provides an average operating budget and the average startup costs for a small market station and for a mid-size market station, intended to reflect newsrooms that are neither "heavily invested" nor "financially starved."[358] The study finds that although equipment prices are dropping rapidly, rising demand for qualified personnel is increasing the amount stations must spend on salary and benefits.[359] Smith Geiger concludes that a startup news operation would not

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[355] Gray Comments at 17-19; Duhamel Comments at 5-6; Granite Comments at 6-7, 11-12; NAB Comments at 75-78; Nexstar Reply Comments at 11-12.

[356] Gray Comments at 18-19. Similarly, Granite contends that "local" news is not so local anymore because financial pressures have forced broadcasters to take cost-cutting measures such as filling local newscasts with regional and national feeds. Granite Comments at 7.

[357] *NAB Newsroom Costs Study*, *supra* note 318.

[358] To determine the costs, Smith Geiger states that it polled multiple stations in each market range, but it does not specify how many stations were polled, how the stations were selected, or its polling methodology. *Id.* at 2.

[359] *Id.*

"break even" until year 13 in a small market and year 14 in a mid-sized market.[360] The study concludes that in this climate, if a local station were to cease news operations, "it is difficult to imagine another entity stepping in to take its place."[361] Smith Geiger notes that although news operations earn a profit,[362] they require the parent company or station to carry a significant cost load and deal with other intangibles such as personnel management, liability, and community goodwill.[363] Smith Geiger concludes that this may lead local stations to exit the local news business in favor of lower cost alternatives, such as acquired programming, which it estimates will earn a higher profit in both small and mid-sized markets.[364] Smith Geiger ultimately concludes that "the continuing profitability of a local television news operation is now highly uncertain."[365] Many commenters agree.[366] NAB submitted an additional study which compares the average cost of producing news by affiliates of "Big Four" networks (*i.e.*, ABC, CBS, Fox, and NBC) in markets of various sizes.[367] These data show that the average news expense of affiliate stations has increased by as much as 104% between 1993 and 2001.[368]

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[360] *Id.* at 6, 11.

[361] *Id.* at 15.

[362] Smith Geiger finds that existing news operations in mid-sized markets earn a 40% profit margin, and that news operations in small markets earn a 30% profit margin. *Id.* at 13.

[363] *Id.*

[364] *Id.* at 13-15.

[365] *Id.* at 2.

[366] Alaska Comments at 5-6; Bear Stearns Comments at 5; Gray Comments at 16-19; Granite Comments at 12-14; NAB Comments at 75-78.

[367] NAB Comments, Small to Medium Markets Statement, *supra* note 318.

[368] *Id.* Specifically, the study shows that between 1993 and 2001, the average increase for stations in markets 51-75 was 71%; in markets 76-100, 104%; in markets 101-125, 58%; in markets 126-150, 56%; and in markets 151-175, 82%.

168. Smith Geiger does not provide detailed information on how it gathered its data, how many stations were sampled, or how the stations were selected. The study data may have been gathered from hundreds of stations or a mere handful. However, NAB's other study concerning the costs of producing news, which describes its methodology and surveys a broad range of stations, supports the conclusion that news costs are rising. Moreover, there is no contrary evidence in the record to suggest that the cost of producing news and public affairs programming is decreasing. We also recognize that certain factors, such as declines in network compensation[369] and the costs of transitioning to DTV,[370] are likely to place some broadcasters under financial pressures which could cause them to choose a less expensive option than producing their own local programming.

169. *Conclusion.* The current local TV ownership rule is not necessary in the public interest to promote localism. More likely, the current rule is hindering our efforts to promote localism. Anecdotal and empirical evidence in the record demonstrates post-combination increases in the amount of local news and public affairs programming offered by commonly owned stations. Moreover, rising news production costs and other factors may cause broadcasters to turn to less costly programming options. Having found that there is a positive correlation between same-market combinations and the offering of local news, we agree with NAB and others who contend that modifying the local TV rule is likely to yield efficiencies that will allow broadcasters to invest in new local news and public affairs programming, or at least to maintain existing local programming.

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[369] Alaska Comments at 5-6; Granite Comments at 12; NAB Comments at 74.

[370] Alaska Comments at 5-6; Bear Stearns En Banc Statement at 3; Gray Comments at 18; Granite Comments at 12; NAB Comments at 72-75. *See also* ¶¶ 148-149, *supra*.

c. Diversity

170. Section 202(h) requires that we consider whether the local TV ownership rule is necessary in the public interest to promote our diversity goal. Our current rule measures viewpoint diversity largely through its voice test, which ensures that all television markets have at least eight independent broadcast television voices. The *Sinclair* court remanded the Commission's decision in the *Local TV Ownership Report and Order* on grounds that we failed to adequately explain why only television broadcast stations are relevant to our diversity analysis for purposes of our local TV rule, when several other kinds of media were deemed relevant to our diversity analysis for purposes of other rules. Accordingly, we also sought comment on whether additional media should be considered in evaluating diversity in local television markets. The *Notice* also sought comment on the extent to which local television stations express viewpoints, and whether there is a connection between ownership and viewpoint.

171. As discussed in the Policy Goals Section, we find that, as we have previously held, multiple media owners are more likely to present divergent viewpoints.[371] Upon review of the record in this proceeding as well as our own analysis of local media markets, we find that media other than television broadcast stations contribute to viewpoint diversity in local markets. The data in the record indicate that the majority of markets have an abundance of viewpoint diversity. We conclude therefore that our existing local TV ownership rule is not necessary to achieve our diversity goal. In order to promote viewpoint diversity, we will rely on a combination of our cross media limits, discussed below at Section VI.D., as well as revised local television and local radio ownership caps.

172. Although our local TV ownership rule was not intended to promote program diversity, our *Notice* also sought comment

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[371] *See* Policy Goals, Section III, *supra*.

on the relationship between our local TV ownership rule and program diversity. We also conclude that the current rule is not necessary to promote program diversity.

(i) Viewpoint Diversity

173. Proponents of relaxing the rule contend that owners of television stations do not present their own viewpoints,[372] that each television station presents multiple viewpoints,[373] that a single owner of more than one television station in a market has greater economic incentives to present a broader diversity of viewpoints in order to attract more viewers,[374] and that under the current rule, television stations avoid presenting extreme views in order to avoid alienating viewers.[375] Several commenters contend that the current rule actually poses a threat to viewpoint diversity.[376] Duhamel asserts that in today's economic climate, if broadcasters cannot consolidate within

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[372] Belo Comments at 14-16, 17-19; Duhamel Comments at 7; Granite Comments at 10-11; Sinclair Comments at 50-52, Exhibit 24; Belo Reply Comments at 3-5.

[373] Granite contends that every station presents multiple viewpoints, citing, among other things, political broadcasting requirements that ensure that stations serve "as a megaphone for all candidates, not just those with whom the broadcaster agrees." Granite Comments at 10-11. *See also* Statement of Jay Ireland, President, NBC Stations at FCC Field Hearing on Media Ownership (Feb. 27, 2003)at 4 ("NBC En Banc Statement").

[374] Fox Comments at 51-52 (a single owner of multiple outlets has a greater incentive to provide viewpoint diversity than would multiple owners); NAB Comments at 32-35; Nexstar Comments at 8-9 (viewpoint diversity will not be reduced but increased, as demonstrated by the maintenance of separate news staffs and different news content by LMA combinations operated by Nexstar and Quorum); Paxson Comments at 7-8; 28 (market forces will promote diversity goals); Sinclair Comments at 26-28, Exhibit 16 (common ownership or operation has increased viewpoint diversity in some cases, as evidenced by certain Sinclair duopolies/LMAs).

[375] Granite Comments at 10-11; Belo Comments at 14-16.

[376] Duhamel Comments at 7. *See also* Coalition Broadcasters at 6 (combinations promote diversity by ensuring the viability of local broadcasters that might otherwise go dark).

local markets, stations will go dark, resulting in greatest possible harm to diversity.[377]

174. We recognize that a single media owner may elect to present a range of different perspectives on a particular political or social issue. It may also be accurate that, as several commenters contend, a single owner of multiple media outlets in a local market may have a greater incentive to appeal to more viewers by presenting more perspectives than do multiple owners of single outlets. Even if a single owner of multiple television stations in the same market has an enhanced ability and incentive to present a broader range of viewpoints, that single owner still retains "ultimate control over programming content, who is hired to make programming decisions, what news stories are covered, and how they are covered."[378] We conclude that we cannot rely exclusively on the economic incentives that may or may not be created by ownership of multiple television stations to ensure viewpoint diversity. However, as we discuss further below, because we find that other media contribute to viewpoint diversity in local markets, we conclude that our existing local TV ownership rule is not necessary to achieve our diversity goal.

175. *Contribution of Other Media to Viewpoint Diversity in Local Markets.* The local television ownership rule has traditionally focused only on the contribution of television broadcast stations to diversity in local markets. In the 1998 Biennial Review proceeding, the Commission sought comment on media substitutability, but was "unable to conclude from the record the extent to which other media serve as readily available substitutes for broadcast television." Lacking adequate factual information concerning the contribution of other media to competition and diversity in local markets, the

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[377] Duhamel Comments at 7.

[378] UCC Comments at 3-4. *See also* CWA Comments at 28-32, 42-45.

Commission established a voice test that included only full power television broadcast stations.

176. The *Notice* sought comment on whether, and if so how, to apply a voice test as part of our local television ownership rule. The *Notice* asked whether additional media such as radio stations, daily newspapers, cable systems, DBS, and DARS should count towards any voice test adopted as part of a local TV ownership rule.[379] Stated differently, the *Notice* sought comment on what media contribute to viewpoint diversity in local markets. Based on the evidence in the record, including our own evaluation of the media marketplace, we find that media outlets other than television stations contribute significantly to viewpoint diversity in local markets, and that our current rule fails to account for this diversity.

177. All of the commenters proposing modification or elimination of the local TV ownership rule argue that there is today an abundance of viewpoint diversity, and that even if the local TV ownership rule is relaxed or eliminated, the market will ensure continued availability of viewpoint and other types of diversity.[380] These commenters contend that, given current levels of diversity in local markets, the Commission cannot justify its current local TV ownership rule on diversity grounds.[381] Commenters further assert that the current rule inappropriately and incorrectly focuses only on television voices, when other media voices clearly contribute to diversity

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[379] *Notice*, 17 FCC Rcd at 18528-29 ¶ 77.

[380] Nexstar Comments at 6-13; Paxson Comments at 28 (asserting that the market and public demand has produced a great diversity of voices, and there is no incentive for large station group owners to "descend upon communities and extinguish the diversity," nor any evidence of an ability or intention to do so); Gray Reply Comments at 4-5; Paxson Reply Comments at 3; NBC En Banc Statement at 4.

[381] Alaska Comments at 4-5; Belo Comments at 21-22; Duhamel Comments at 6-7; Fox Comments at 44-47; Granite Comments at 10-11; Gray Comments at 14-15; NAB Comments at 35-39, 44; Nexstar Comments at 8-9; Paxson Comments at 27-30; Sinclair Comments at 22-25.

in local markets.[382] Commenters also state that programming other than local news may contribute to viewpoint diversity, and that such programming should be considered in measuring viewpoint diversity.[383]

178. We agree that television broadcast stations are not the only media outlets contributing to viewpoint diversity in local markets. The market for viewpoint and the expression of ideas is, therefore, much broader than the economic markets, defined above, in which broadcast stations compete. In particular, in focusing on the delivered video market alone, we would ignore countless other sources of news and information available to the public.[384] As a corollary, however, limits imposed on

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[382] Alaska Comments at 4-5; Belo Comments at 19-22 (daily newspapers, news/talk radio stations, cable news and public affairs programming, weekly newspapers and magazines, and Internet sources contribute to viewpoint diversity even more than television stations); Emmis Comments at 26-30; Fox Comments at 6-10, 50; Gray Comments at 14-15 (viewpoint diversity is guaranteed by availability of news and information from numerous radio and television stations, hundreds of video programming services, MVPDs, daily and weekly newspapers, thousands of periodicals, millions of web sites, and wireless data services); NAB Comments at 32; Pappas Comments at 15; Paxson Comments at 27-28; Sinclair Comments at 25-28. Gray counts low power television ("LPTV") stations among the voices contributing to diversity in markets served by its stations. Gray Comments at 10-13. *See also* IPI Comments at 19-20, 24-27 (urging us to consider the role of LPTV stations because LPTV stations may serve as substitutes for other local media for certain consumers and advertisers); Louisville Communications Reply Comments at 2-6; at 2. *See* Letter from Howard M. Liberman, Drinker Biddle & Reath, counsel for Nexstar, to Marlene H. Dortch, Secretary, FCC (May 16, 2003) at 2-3 ("Nexstar May 16, 2003 Ex Parte").

[383] Fox Comments at 50-51. *See also* Sinclair Comments at 21, 34-38 (if viewpoint diversity means something more than local news, the Commission also should factor in all programming that contributes to an awareness of political and social issues, including national news, non-traditional news, and certain entertainment programming); *but see* NAB Comments at 39-40 (most television and radio programming is entertainment-oriented and does present viewpoints).

[384] *See* MOWG Study No. 8, *Consumer Survey on Media Usage* by Nielsen Media Research (Sept. 2002) ("MOWG Study No. 8").

television station combinations designed to protect competition in local delivered video markets necessarily also protect diversity; indeed they are more protective of competition in the broader marketplace of ideas given the difference in market definition.

179. We do not, therefore, necessarily disagree with those who maintain that a local television ownership cap can help to protect the public's First Amendment interest in a robust marketplace of ideas.[385] We disagree, however, to the extent that they advocate a diversity-based rule that looks to broadcast-only television voices.[386] Accepting this narrowly-defined view would result in a rule that is overly restrictive both for competition and diversity purposes, because it would fail to include other participants in some relevant product markets and in the marketplace of ideas. Such an approach cannot be squared with our statutory mandate under section 202(h) or our desire to minimize the impact of our rules on the rights of speakers to disseminate messages.

180. Accordingly, by setting our local television ownership caps only so high as necessary to protect competition in the delivered video market, we will achieve necessary protection for diversity purposes without unduly limiting speech. As set

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[385] AFL-CIO Comments at 3-4; CFA Comments at 54-55; UCC Comments at 2-3; Children Now Comments at 24-28.

[386] Several commenters assert that evaluating broadcast-only voices is appropriate because other media are not effective substitutes for television. CFA Comments at 176-77; CWA Comments at 8-13; UCC Comments at 29-35; Children Now Comments at 9-12. Specifically, they contend that television broadcast stations remain the public's primary source of local news and public affairs programming, and that other media contribute little or nothing to viewpoint diversity in local markets. *See* UCC Comments at 29-35; Children Now Comments; IPI Comments at 22. They also contend that free over-the-air television is the only source of any video programming for a significant portion of the U.S. population. UCC Comments at 29, 32; Children Now Comments at 9; Smith Comments at 3; IPI Comments at 23-24.

forth above, our current rule is not necessary to protect competition and, indeed, may be harming competition in the delivered video market. It likewise cannot be justified on diversity grounds as it is overly restrictive. Our modifications to the rule, discussed below, remedy that failing.

(ii) Program Diversity

181. The local TV ownership rule has not traditionally been justified on program diversity grounds. However, the *Notice* sought comment on whether common ownership of multiple stations promotes program diversity, and if so, how this affects the need for the current local TV ownership rule. Commenters supporting relaxation or elimination of the local TV ownership rule assert that a single owner of multiple television stations has an enhanced incentive and ability to offer more diverse programming.[387] Entravision, which does not take a position on whether the rule should be modified, agrees that same-market combinations give owners an incentive to increase program diversity by reaching out to minority/niche audiences, but is concerned that entities owning more than one station in a market will engage in anticompetitive conduct that will endanger smaller broadcasters already serving niche audiences.[388] Entravision predicts that ultimately, abuse of

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[387] Duhamel Comments at 7 (an owner with two or more stations has a greater incentive to diversify its programming to attract new demographics); Entravision Comments at 5-6 (local duopolies have found that it is more profitable not to duplicate formats, but to "reprogram" one station to target underserved audiences); Fox Comments at 51-52; NAB Comments at 36-37; Nexstar Comments at 11-12; Paxson Comments at 13-14; Paxson Reply Comments at 5. Coalition Broadcasters filed a study comparing the pre-and post-combination advertising revenue and audience shares of their stations in LMAs and duopolies. Coalition Broadcasters Comments at 7, Attachment A. The study concludes that the combinations result in an average audience share increase of 3.2 points and an average advertising revenue increase of 250.7%. *Id.* Coalition Broadcasters believe that, by strengthening their appeal to their local communities and becoming more financially viable, these stations are increasing diversity within their respective markets. *Id.*

[388] Entravision Comments at 5-6.

market power by "consolidated broadcasters" may drive smaller broadcasters out of business, resulting in a mere substitution of programming for minority/niche audiences, rather than actually increasing program diversity.[389] Children Now asserts the diversity of children's programming will be harmed by an increase in same-market combinations, because local broadcasters will repurpose children's programming, resulting in less original programming for children.[390] Children Now urges us to retain the local TV ownership rule to ensure that a single owner of multiple television stations in a market does not offer the exact same programming to children as a means of meeting our children's programming requirements.[391] Alternatively, Children Now urges us to clarify that the use of same programming on multiple commonly owned stations in the same market does not satisfy our children's programming requirements.[392]

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[389] *Id.*

[390] Children Now Comments at 13-17. *See also* UCC Comments at 28 (contending that newspaper-broadcast cross-ownership will result in re-purposing of local news); AFL-CIO at 49-50; AFTRA Comments ¶¶ 42-43 (asserting that media concentration in general causes media outlets to obtain and repurpose material from competitors).

[391] Children Now Comments at 16-17; *Big Media, Little Kids: Media Consolidation and Children's Television Programming, A Report by Children Now* (May 21, 2003) at 2, 5-6, 9 ("*Children Now Report*") (finding that, in the Los Angeles, California DMA, that the number of hours of children's programming aired by television broadcast stations decreased by more than 50% between 1998 and 2003, and that the largest decreases in programming hours occurred at commonly owned stations); *but see*, Letter from John C. Quale, Skadden, Arps, Slate, Meagher & Flom, counsel for Fox, to Marlene H. Dortch, Secretary, FCC (May 28, 2003) ("Fox May 28, 2003 Ex Parte") (disputing findings in the *Children Now Report* with respect to television station combinations in the Los Angeles DMA and urging the Commission not to rely on such findings).

[392] *Children Now Report* at 9.

182. We find that modification of the current local TV ownership rule may enhance program diversity. As we explained in our discussion of policy goals (Section III(A)(2), *supra*), program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation. Our local TV ownership rule will ensure robust competition in local DVP markets. As long as these markets remain competitive, we expect program diversity to be achieved through media companies' responses to consumer preferences. Nothing in the record seriously calls that conclusion into question.

183. We share the concern of Children Now that the diversity of children's educational and informational programming could be reduced if commonly owned stations in the same market air the same children's programming. A primary purpose of the Children's Television Act of 1990 was to increase the amount of educational and informational programming available to children.[393] It would be inconsistent with this Congressional objective to permit commonly owned stations in a market to rely on the same programming to meet the obligations set forth in Section 73.671 of our rules.[394] We therefore clarify that where two or more stations in a market are commonly owned and air the same children's educational and informational program, only one of the stations may count the program toward the three-hour processing guideline set forth in Section 73.671.[395]

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[393] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b, 394. The Children's Television Act of 1990 and our related rules are premised on the notion that market forces are insufficient to ensure adequate levels of children's programming. *See* S. Rep. No. 227, 101st Cong., 1st Sess. at 9 (1989); *Policies and Rules Concerning Children's Programming*, 11 FCC Rcd 10660, 10676 ¶ 34 (1995).

[394] *See* 47 C.F.R. §73.761.

[395] Under the Section 73.671 processing guidelines, a broadcaster can

184. Commenters supporting retention of the current local TV ownership rule focus primarily on the importance of the rule to viewpoint diversity, not other forms of diversity. For example, CFA urges the Commission not to focus on protecting the diversity of entertainment programming, but on the diversity of news and information programming, which it ties to the number of owners, not to types of programming.[396] Although our modifications to the local TV ownership rule may result in increased program diversity, we are not prioritizing program diversity over viewpoint diversity. Rather, we are revising our entire local television ownership framework to reflect the contribution of other media to competition and viewpoint diversity in local television markets. As an added benefit, today's changes to the local TV ownership rule will allow market forces to yield greater program diversity.

2. Modification of the Local Television Ownership Rule

185. Based on our section 202(h) determination that the current local TV rule is no longer necessary in the public interest to promote competition and diversity, as well as our

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receive staff-level approval of its renewal application by airing at least three hours per week of programming that satisfies the criteria of programming specifically designed to serve the educational and informational needs of children ("core programming"). 47 C.F.R. § 73.671 Note 2. Alternatively, a broadcaster can receive staff-level renewal by showing that it has aired a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of core programming, demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of core programming. In this regard, specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children can count toward the three-hour processing guideline. Licensees not meeting these criteria will have their license renewal applications referred to the Commission.

[396] CFA Comments at 176 (asserting that the debate over media ownership "is about news and information for citizens as listeners and speakers, not about entertainment outlets.").

finding that the current rule may hinder achievement of our localism policy goal, we must either eliminate or modify our local TV ownership restrictions. As we will explain further below, we conclude that elimination of the rule would result in harm to competition in local DVP markets, thereby harming the public interest. Elimination of the rule also would adversely affect competition in the advertising and program production markets. Accordingly, we modify the rule.

186. Our modified local TV ownership rule will allow ownership combinations that satisfy a two-part test: a numerical outlet cap and a top four-ranked standard. Our outlet cap will allow common ownership of no more than two television stations in markets with 17 or fewer television stations; and up to three stations in markets with 18 or more television stations. In counting television stations for purposes of this outlet cap, we will include all full-power[397] commercial and noncommercial[398] television broadcast stations assigned by

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[397] For purposes of counting the television broadcast stations in the market, we will include only full power authorizations. Thus, contrary to the suggestions of some commenters, we will not include Class A TV, LPTV stations or TV translators. *See* IFI Comments at 19-20, 24-27; Louisville Reply Comments at 2-6; at 2; Nexstar May 16, 2003 Ex Parte at 2. LPTV stations typically reach only a small portion of any given DMA, even in the few cases where they are carried by cable systems. Thus, the stations do not compete with DVP market participants on a DMA-wide basis, which we have held is the relevant geographic market. We also will exclude from our count any non-operational or dark stations. Newly constructed television stations that have commenced broadcast operations pursuant to program test authority also will be included in the DMA count. Television satellite stations will be excluded from our count of full power television stations in the DMA where the satellite and parent stations are both assigned by Nielsen to the same DMA. A satellite station assigned to DMA different from that of its parent, however, will be included in the TV station count for that DMA. DTV stations will be included in our count only if they are operating and are not paired with an analog station in the market.

[398] Our current local TV multiple ownership rule does not restrict the number of noncommercial television stations that can be owned by one entity. Consistent with past practice, our modified rule also will not affect

Nielsen to a given DMA.[399] Our top four-ranked standard will prohibit combinations which would result in a single entity owning more than one station that is ranked among the top four stations in the market based on audience share. Hence, same-market combinations will not be permitted in markets with fewer than five television stations. For purposes of applying our top four-ranked standard, a station's rank will be determined using the station's most recent all-day audience share, as measured by Nielsen or by any comparable professional and accepted rating service, at the time an application for transfer or assignment of license is filed, the same method as under our current rule.

187. The contour overlap provision of the rule will be eliminated, and the modified rule will be applied without regard to Grade B contour overlap among stations. Thus, if two stations in a market do not have overlapping contours, they still cannot be combined unless there are five or more stations in the market and at least one station in the combination is not among the top four. We have determined that, because of mandatory carriage requirements, the DMA – not the area within a particular station's Grade B contour—is the geographic market

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ownership of noncommercial television stations. Our decision to include noncommercial television stations in the TV station count also is consistent with our past practice and with the fact that noncommercial stations compete for viewers in local markets. See 47 C.F.R. § 73.3555(b)(2)(ii) (including noncommercial stations in the count for purposes of the eight-voices test under current local TV rule).

[399] There are a few instances in which a station's community of license is physically located in one DMA, but the station is assigned by Nielsen to a different DMA. We clarify that for purposes of our local TV ownership rule, a station will be considered to be "within" a given DMA if it is assigned to that DMA by Nielsen, even if that station's community of license is physically located outside the DMA. In addition, we recognize that certain geographic areas (specifically, Puerto Rico, Guam, and the U.S. Virgin Islands) are not assigned a DMA by Nielsen. For purposes of our local TV ownership rule, Puerto Rico, Guam, and the U.S. Virgin Islands each will be considered a single market.

in which DVP providers compete. Therefore, permitting station combinations solely on grounds that they do not have overlapping contours would be inconsistent with our market definition. As we explained above, the majority of viewers—including those who reside in geographically large DMAs—have access to television broadcast stations that they could not view over-the-air because they can view the stations via cable. Increasingly, local stations also are available via DBS. To avoid imposing an unfair hardship on parties that currently own combinations that do not comply with the modified rule, we will grandfather existing combinations, as discussed further below. In addition, because our assumption regarding DMA-wide carriage is not universally true, and in recognition of the signal propagation limitations of UHF signals, we adopt herein a waiver standard that will permit common ownership of stations where a waiver applicant can show that the stations have no Grade B overlap and that the stations are not carried by any MVPD to the same geographic area.

188. The public is best served when numerous rivals compete for viewing audiences. In the DVP market, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. The additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by existing viewers.[480] Below, we discuss how our analysis of competition in local DVP markets supports the modified rule.

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[480] For a discussion of program provision under different market structures, *see*, Peter Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio* Broadcasting, 66(2) Q. J. ECON 194-223 (1952); MOWG Study No. 6, A Theory of Broadcast Media Concentration and Commercial Advertising by Brendan C. Cunningham and Peter J. Alexander (Sept. 2002) at 3-5 ("MOWG Study No. 6"); and Sinclair Comments, Baumann/McAnneny Statement at 2-6.

a. Evaluating Potential Competitive Harms Within Local DVP Markets.

189. Consistent with our competition policy goal, our local television ownership rule seeks to preserve a healthy level of competition in the market for DVP. The state of competition in this market affects the quality and diversity of programming content and therefore the overall welfare of DVP viewers. In formulating our local TV multiple ownership rule, we must assess the nature of this competition and weigh the potential benefits and anticompetitive harms that may arise from the increase in market concentration that results from a single firm owning multiple broadcast stations in a market.

190. There are two potential competitive harms that may be caused by a single firm owning multiple television stations in a market. First, ownership of multiple stations may result in "unilateral effects," *i.e.*, the firm acquiring multiple licenses may find it profitable to alter its competitive behavior unilaterally to the detriment of viewers. An example of such an effect would be the decision to cancel local news programming on one of the commonly-owned channels. Second, the acquisition of multiple licenses in a local market by a single firm may lead to "coordinated effects." That is, the increase in concentration may induce a joint change in competitive behavior of all the market participants in a manner that harms viewers.

191. We recognize the importance of competition from cable networks in the market for DVP. Indeed, viewing of cable network programming now accounts for approximately half of all television viewership.[401] Nevertheless, in formulating our revised ownership rules, we continue to draw a distinction between television broadcast stations and non-broadcast DVP

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[401] In June 2002, cable networks for the first time collectively exceeded a 50% share for the month (54% primetime share), while the broadcast networks collectively registered a 38% primetime share. *See* Romano, *supra* note 251 at 12.

outlets. This is because television broadcast stations and cable programming networks have different incentives to react to a change in local market concentration, which suggest differing levels of unilateral and coordinated effects. In particular, cable networks are almost exclusively offering national or broadly defined regional programming. Therefore, the profit-maximizing decisions of a national cable programmer reflect conditions in the national market. It is improbable that a change in concentration in any single local market would affect the competitive strategy of a national cable network. In contrast, we need to consider the possible competitive responses from other DVP outlets in local markets, which are almost exclusively television broadcast stations. Because of the differing footprints of cable networks and television broadcast stations, any possible competitive harms are more likely to arise from changes in the behavior of stations. Thus, our rules to promote local television competition are focused on ownership of television broadcast stations.

b. Welfare Enhancing Mergers in Local Delivered Video Markets.

192. The standard approach to evaluating the competitive harms of an increase in horizontal market concentration is outlined in the DOJ/FTC Merger Guidelines. The DOJ/FTC Merger Guidelines recognize the HHI level of 1800 as the maximum level of "moderate concentration."[402] We choose this threshold rather than the lower limit of 1000 because we recognize the competitive pressures exerted by the cable networks. The 1800 threshold corresponds to having six equal-sized competitors in a given market. The DOJ/FTC Merger Guidelines however, are written not for a specific industry, but rather as guidelines intended for application across all industries. Our rules are formulated for a specific market—the delivery of video programming—and are based on an extensive record on the extent of competition in this market and the effect

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[402] *DOJ/FTC Merger Guidelines* § 1.51.

of our current local TV ownership rule. This record allows us to craft a more finely-tuned rule for this industry.

193. First, the nature of the DVP market is such that there is constant product innovation with new program choices each season. In such a market, a firm's market share is more fluid and subject to change than in other industries. Hence a firm's "capacity" to deliver programming can be as important a factor in measuring the competitive structure of the market as is its current market share. Second, as each broadcast station requires a license, the number of licenses that a firm controls in a market is the measure of its capacity to deliver programming. Therefore, as a starting point, a simple application of the *DOJ/FTC Merger Guidelines* six-firm threshold suggests that, a single firm holding three licenses in a market with 18 or more licenses, or a firm holding two licenses in a market with 12 or more licenses, would not raise competitive concerns. However, as explained below, given the structure of the DVP market, a strict, overly simplistic application of the *DOJ/FTC Merger Guidelines* would potentially prohibit some welfare enhancing mergers and allow some anticompetitive mergers.

194. Ownership of multiple stations can lead to significant efficiencies. The record demonstrates, for example, that same-market combinations have resulted in an increase in viewership of the lower-ranked of the two stations in the combination, evidencing a welfare enhancing effect for consumers.[403] The possibility of welfare enhancing mergers has long been recognized in economics and antitrust literature. For example, the work of McAfee and Williams demonstrates that strict application of the *DOJ/FTC Merger Guidelines* would disallow some welfare enhancing mergers.[404] McAfee and Williams

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[403] Coalition Broadcasters Comments at Attachment A; *Owen Media Ownership Statement*. Of course the opportunity cost of viewership is that time could be spent on some other activity, thus an increase in viewership demonstrates an increase in the public's overall value of the programming.

[404] R. Preston McAfee and Michael Williams, *Horizontal Mergers and*

present a model in which, after a merger of independently owned production facilities, the merged firm will run the two facilities to jointly maximize its profits. McAfee and Williams find that mergers that do not create a new largest firm are welfare enhancing. A similar conclusion is found in the work of Froeb, Werden, and Tardiff ("Froeb *et al.*").[405] In their research, which considers mergers in the context of competition by firms producing differentiated products, Froeb *et al.* find that mergers among smaller firms tend to be welfare enhancing, and that mergers that do not create a significant increase in the market share of the largest firm pose little risk of competitive harm. By contrast, the research of Froeb *et al.* demonstrates that a merger of the second and third largest firms, which would significantly overtake the largest firm in size, would create welfare harms.

195. These results are particularly relevant to competition within local markets for DVP. Each broadcast station tends to deliver a differentiated product, and we have evidence of efficiencies from the ownership of multiple stations in a market. Moreover, in local markets, there is a general separation between the audience shares of the top four-ranked stations and the audience shares of other stations in the market.[406] A review of the audience shares of stations in every market with five or more commercial television stations (*i.e.*, 120 markets) indicates that in two-thirds of the markets, the fourth-ranked station was at least two percentage points ahead of the fifth-

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Antitrust Policy, XL J. INDUS. ECON 181-87 (June 1992).

[405] Luke M. Froeb, Gregory J. Werden and Timothy J. Tardiff, *The Demsetz Postulate and the Effect of Mergers in Differentiated Product Industries*, Working Paper EAG 93-5 Economic Analysis Group, Antitrust Division, U.S. Department of Justice (Aug. 1993). *See also* Gregory Werden and Luke M. Froeb, *The Effects of Mergers in Differentiated Products Industries: Logit Demand and Merger Policy*, 10(2) J. L. ECON ORG. 407-16 (1994).

[406] *See* BIA Media Access Database (Mar. 18, 2003).

ranked station.[407] Two percentage points represents a significant difference in audience share because for a station to jump from, for example, an eight share to a ten share, it would have to increase its audience share by 25%. Thus, although the audience share rank of the top four-ranked stations is subject to change and the top four sometimes swap positions with each other, a cushion of audience share percentage points separates the top four and the remaining stations, providing some stability among the top four-ranked firms in the market. Nationally, the Big Four networks each garner a season to date prime time audience share of between ten and 13 percent, while the fifth and sixth ranked networks each earn a four percent share.[408] While there is variation in audience shares within local markets, these national audience statistics are generally reflected in the local market station rankings. The gap between the fourth-ranked national network and the fifth-ranked national network represents a 60% drop in audience share (from a ten share to a four share), a significant breakpoint upon which we base our rule.

196. Other persuasive evidence of a separation between top four-ranked stations and other stations includes a study comparing audience shares of stations in ten markets of various sizes.[409] The study finds that the top four-ranked stations

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[407] IPI contends that the use of audience share rank as a metric in evaluating local ownership is "problematic" because ranks vary from quarter to quarter. IPI Comments at 19. In support of this, IPI cites data showing that, over an 18-month period, three different stations occupied the fourth-ranked position in the Los Angeles, California DMA. *Id.* As we explain above, our review of BIA data in over 120 DMAs shows that in over two-thirds of these markets, at least two percentage points separate the fourth and fifth ranked stations. In light of this evidence gathered from our review of a broad range of DMAs, we do not agree that data from a single DMA should dictate whether we rely on audience share rank as a metric for purposes of our local TV ownership rule.

[408] *Nielsen Ratings*, BROADCASTING & CABLE (May 26, 2003) at 11.

[409] *See* UCC Comments in MM Docket No. 01-235 at Attachment 3. UCC

control a combined total of at least 75% of each market's audience share.[410] Mergers of stations owned by any of these top four firms would thus often result in a single firm with a significantly larger market share than the others. Our analysis of the top four local stations is related to our analysis of the four leading broadcast networks in connection with the dual network rule. There we conclude that Big Four networks continue to comprise a "strategic group" within the national television advertising market. That is due largely to those networks' continued ability to attract mass audiences. It is this network programming that explains a significant portion of continued market leadership of the top four local stations in virtually all local markets. Thus the continued need for the Dual Network rule to protect competition at the network level also supports our decision to separate ownership of local stations carrying the programming of Big Four networks.[411]

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conducted a study of ten local television markets of various sizes. The UCC study found that in all markets, including the two largest television markets (New York, New York and Los Angeles, California), the top four-ranked television stations control more than 75 percent of the market, measured by viewership over the twelve-month period. In four of the markets, the top four stations had more than 90 percent of the market, and in three markets, the top four stations had 100 percent of the market. *Id.*

[410] *Id.*

[411] The local television ownership rule is consistent with a key aspect of our national television ownership rule in recognizing competitive disparities among stations. Our national television ownership cap recognizes competitive disparities between stations through use of the UHF discount, while our local television ownership cap recognizes competitive disparities between stations by prohibiting mergers of the top four-ranked stations in a market. The national ownership rule is an audience reach limitation, so it makes sense to adjust that limitation based on the diminished coverage of UHF stations. The local ownership rule, on the other hand, places a limitation on the number of stations that one entity may own in a market. Thus, that rule limits mergers of the top four-ranked stations in a market. Furthermore, in the local television ownership rule, we take account of a station's UHF status in considering certain waiver requests, as discussed

197. Permitting mergers among top four-ranked stations also would generally lead to large increases in the HHI. Although we believe that mechanical application of the *DOJ/FTC Merger Guidelines* may provide misleading answers to competitive issues in the context of local broadcast transactions, as a general matter, sufficiently large HHIs establish a *prima facie* case in antitrust suits.[412] Commenters who urge us to permit more same-market combinations focus primarily on the efficiencies and public interest benefits associated with a financially strong station merging with a financially weak station.[413] Such mergers are unlikely to create or enhance market power or to facilitate its exercise. In contrast, no commenter discussed the efficiencies and public interest benefits associated with a merger between two financially strong stations. Nothing in the record indicates that such mergers will produce efficiencies that translate into benefits for the viewing public. To the contrary, such mergers are likely to

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further below. Finally, we note that the top-four merger restriction in our local television ownership rule and the UHF discount in our national television ownership rule, while analogous, are not identical and do not serve exactly the same purpose. The UHF discount is premised, in part, on promoting the development of new and emerging networks. This rationale does not apply in the local television ownership context because ownership of multiple stations in a market does not promote development of new networks. The top-four limitation in the local television ownership rule, in contrast, is premised on competition theory, which is not the basis for the national television ownership rule.

[412] *FTC v. Heinz*, 246 F.3d 708, 716 (D.C. Cir. 2001).

[413] NAB proposes a local television ownership rule "that would provide needed financial relief for lower-rated stations (which are particularly struggling financially)." NAB Comments at 70. Coalition Broadcasters provide examples of joint operations involving at least one weak station, with little, or no, local news, and argue that these combinations make it possible for "those struggling stations to survive." Coalition Broadcasters at 15 – 33, and Attachment A at 1. Nexstar argues that without joint operation, many stations in small and mid-sized markets will not survive. Nexstar May 16, 2003 Ex Parte at 1.

create or enhance market power or to facilitate its exercise. Therefore, by allowing firms to own multiple stations, but prohibiting combinations among the top four-ranked stations, we enable the market to realize efficiency gains and improve the quality of product in the video programming market while mitigating the risk of harmful coordinated or unilateral competitive harms.

198. One reason that combinations involving top four-ranked stations are less likely to yield public interest benefits such as new or expanded local news programming is that such stations generally are already originating local news. Some commenters contend that the Commission has never demonstrated that top four-ranked stations are generally the market's news providers. Yet the data provided by some of these very commenters confirms that this is the case. In support of its contention that the Commission should eliminate the top four-ranked restriction, Fox submitted an empirical study that compares the local news offerings of top four-ranked stations and other stations in the 210 DMAs.[414] The Fox Top Four Study finds that 668 stations ranked among the top four offer local news.[415] We have determined that, because there are less than four stations in some markets, the total number of top four-ranked stations is 779. Therefore, fully 85% of top four-ranked stations offer local news. Fox also found that 164 stations ranked outside the top four offer some local news, although this includes stations that do not originate their own news programming.[416] We have determined that there are 854 stations not ranked among the top four. Thus, even including stations that are re-broadcasting the local news of another station, Fox's data show that only 19% of stations outside the

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[414] Fox Comments, Economic Study A, *News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower-Ranked Television Stations* ("*Fox Top Four Study*").

[415] *Id.* at 8-14.

[416] *Id.*

top four offer local news. Because top four-ranked stations already provide local news programming, a combination involving more than one top four-ranked station is less likely to result in a new or enhanced local news offering than would a combination involving only one top four-ranked station.

199. We also have determined that same-market combinations yield efficiencies that may expedite a station's transition to DTV. However, combinations involving more than one top four-ranked station also are less likely to provide public interest benefits in the form of new DTV service. The financial position of top four-ranked stations makes the transition to DTV more affordable for these stations.[417] Top four-ranked stations also are more likely to have made the transition to DTV than other stations.[418] We therefore conclude that it is less likely that allowing same-market combinations involving more than one top four-ranked station will expedite the provision of DTV service to the public.

200. Permitting combinations among the top four would reduce incentives to improve programming that appeals to mass

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[417] NAB submitted data comparing the average cash flow and pre-tax profits of Big Four affiliates and other stations. *See* Letter from Jack N. Goodman, Senior Vice President and General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC (Apr. 30, 2003) at 2, Chart 1 ("NAB Apr. 30, 2003 Ex Parte"). These data show that, for example, in 2001, Big Four affiliates in the largest markets (*i.e.*, DMAs 1-25) had an average cash flow of $27,410,975, as compared to just $8,013,317 for stations not affiliated with one of the four major networks. *Id.* The average pre-tax profit of a Big Four affiliate that year was $20,356,967, as compared to only $2,807,447 for other stations in the largest markets. *Id.* Because most stations affiliated with the Big Four networks also are top four-ranked stations, we find this data probative of the differences in the financial positions of top four-ranked stations and other stations.

[418] As of May 21, 2003, 903 commercial DTV stations were on the air pursuant to a license, program test authority or special temporary authority. Of these stations, approximately 60% were paired with analog stations that were ranked among the top four in terms of audience share as of the most recent sweeps period. *See* BIA Media Access Database (Mar. 18, 2003).

audiences. The strongest rival to a top four-ranked station is another top four-ranked station. Because top four-ranked stations typically offer programming designed to attract mass audiences, as opposed to niche audiences, a new popular program offered by one top four-ranked station will have a substantial negative impact on the audience shares of the other top four-ranked stations. The enormous potential gains associated with new popular programs provide strong incentives for top four-ranked stations to develop programming that is more appealing to viewers than the programming of their closest rivals. The large number of viewers looking for new programs with mass audience appeal are the direct beneficiaries of this rivalry. When formerly strong rivals merge, they have incentives to coordinate their programming to minimize competition between the merged stations. Such mergers harm viewers.

201. Our decision to allow common ownership of two television stations in markets with fewer than twelve television stations will result in levels of concentration above our 1800 HHI benchmark in markets with fewer than 12 television stations. We permit this additional concentration because the economics of local broadcast stations justify graduated increases in market concentration as markets get smaller.[419] The record demonstrates that owners of television stations in small and mid-sized markets are experiencing greater

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[419] For purposes of applying our cross media limits, which are diversity based, we found that markets with nine or more television stations have a sufficiently large number of media outlets that viewpoint diversity will be protected by our caps on local television and local radio ownership. Measuring the extent of diversity in a market is a separate question from measuring the extent of competition among a particular class of outlets, such as local television stations. Thus, a market with ten television stations can be characterized as "large" from a viewpoint diversity standpoint because of the substantial number of media outlets available in such markets, but "small to mid-sized" when considering solely competition in the delivered video market (which excludes outlets such as radio, newspaper, and the Internet).

competitive difficulty than stations in larger markets. In particular, NAB submitted financial data comparing the average 2002 gross revenues of commercial stations across all DMAs. The data demonstrate that there are fewer stations in smaller DMAs, but as the average number of stations declines, the reduction in the number of stations is outpaced by the decline in average gross revenue.[420] Thus, small market stations are competing for disproportionately smaller revenues than stations in large markets.[421] NAB also submitted data comparing the average pre-tax profits of Big Four network affiliates in DMAs of various sizes.[422] These data show that affiliates in the largest markets (*i.e.*, the top 25 DMAs) had an average pre-tax profit of $20,356,967 in 2001,[423] as compared with an average pre-tax profit of just $1,269,239 among affiliates ranked highest in audience share in the smallest markets (*i.e.*, DMAs 151-175).[424] The lowest ranked affiliates in the smallest markets showed negative average pre-tax profits at -$92,917.[425] We find these data probative of the different economics of station ownership depending on market size. The data confirm that the ability of local stations to compete successfully in the delivered video market is meaningfully (and negatively) affected in mid-sized and smaller markets.

202. Moreover, Congress and the Commission previously have allowed greater concentration of broadcast properties in smaller markets than in larger markets precisely because the fixed costs of the broadcasting business are spread over fewer potential viewers. In 1992, the FCC allowed one firm to own a

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[420] NAB Apr. 30, 2003 Ex Parte at 2, Chart 1.

[421] *Id.*

[422] *Id.*, NAB Comments, Small to Medium Markets Statement.

[423] NAB Apr. 30, 2003 Ex Parte at 1, 3.

[424] NAB Comments, Small to Medium Markets Statement, Table 6.

[425] *Id.*

larger percentage of the total radio outlets in smaller markets.[426] In 1996, Congress's local radio caps were built on this same principle. In the largest markets, it required six independent station owners, but in the smallest markets, it permitted just two firms to own all the radio stations. The limits we adopt today for local television ownership replicate this graduated tradeoff between optimal competition in the delivered video market (six station owners) and recognition of the challenging nature of broadcast economics in small to mid-sized markets.

203. The above discussion illustrates why we must avoid an oversimplified application of the *DOJ/FTC Merger Guidelines*. In particular, the analysis suggests that anticompetitive harms may result from allowing the largest firms to merge, and that we might lose welfare enhancing efficiency gains by disallowing mergers between stations with large audience shares and stations with small audience shares. To allow the market to realize these efficiency gains and prevent potential harms from undue increases in concentration, we therefore allow combinations of two stations provided they are not both among the top four-ranked broadcast stations in the local market. In markets with at least 18 television stations, we further allow a firm to own up to three stations (thus ensuring a minimum of six owners) provided that only one of them is ranked among the top four.

3. Other Issues

a. Alternate Proposals

(i) Proposals to Retain the Existing Rule in its Current Form or With Minor Modifications

204. A number of commenters urge us to retain the existing rule, or make minor modifications.[427] Children Now proposes

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[426] *See 1992 Radio Ownership Order*, 7 FCC Rcd at 2777 (finding that competitive realities are substantially different in markets of different sizes).

[427] These include AFL-CIO, AFTRA, AWRT, CFA, Children Now, CWA,

that the Commission modify the existing rule by prohibiting common ownership of television stations with overlapping Grade B contours in the same market, as it did prior to its 1999 revisions to the rule.[428] AWRT, AFL-CIO, and AFTRA urge the Commission to retain the existing rule, but to count only those voices that actually provide local programming.[429] Children Now and UCC state that if the Commission chooses to revise the current rule by expanding the types of media voices that are considered for purposes of the local television ownership rule, it should raise the threshold voice count required to form a same-market combination.[430] As we explained above, we have determined that retaining our current rule does not comport with our statutory mandate under section 202(h) on competition, diversity, or localism grounds. For the same reasons, we disagree with commenters who contend that an equally restrictive or more restrictive ownership rule is necessary in the public interest. Although our modified rule does not rely upon a "voice test," it calculates the number of stations one can own in a market based, in part, on the number of stations within that market. However, our decision to "count" only broadcast television stations is based on the likely responses of participants in the DVP market to changes in local market concentration, and is aimed at achieving competition in local markets.

205. Smith proposes that if we relax the rule, we should prohibit common ownership of more than one station affiliated with a top four network.[431] Our revised rule prohibits common

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Smith, Stapleton, and UCC. AFL-CIO Comments at ii, 47; AFTRA Comments ¶ 31; CFA Comments at 9, 284; Children Now Comments at ii, 3; CWA Comments at 3, 46; Smith Comments at 3; Stapleton Comments at 15-16; UCC Comments.

[428] Children Now Comments at 3.

[429] AWRT Comments at 8, AFL-CIO Comments at 56.

[430] Children Now Comments at 3; UCC Comments at 46.

[431] Smith Comments at 3. Smith states that prohibiting combinations of Big

ownership of stations that are among the top four in terms of audience share. Although such stations are often affiliated with top four networks, we conclude that audience share rank is a more accurate measure of market power than network affiliation. Therefore, we do not adopt Smith's proposal to prohibit common ownership of more than one station affiliated with a top four network.

206. CFA asserts that while the Commission has ample justification for retaining the current rule, if it chooses to revise the rule, it should apply an "HHI-adjusted voice count" to local TV ownership.[432] Under CFA's proposal, the Commission would calculate the market shares of television broadcast stations in the relevant geographic market, which would be either the DMA or a "weighted average DMA," calculated to account for the fact that certain stations do not have cable carriage throughout the market.[433] CFA proposes that the Commission define highly concentrated markets as those with fewer than six equal-sized voices or a four-firm concentration ratio above 60%.[434] Moderately concentrated markets would be those with between six and ten equal-sized voices or a four-firm concentration ratio of 40-60%.[435] CFA urges us to prohibit any combination that would result in a highly concentrated market.[436] Where a combination would result in moderate concentration, CFA proposes that we permit the combination only if we find that the merger will serve the public interest and if the owner of the merging stations agrees

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Four network affiliates would help preserve existing independent sources of local news.

[432] CFA Comments at 284-85.

[433] *Id.* at 166-167, 284-85, 289. CFA does not specify whether market shares are to be calculated based on audience share or advertising revenue share.

[434] *Id.* at 286.

[435] *Id.*

[436] *Id.*

to retain separate news and editorial departments in different subsidiaries of the merged entity.[437]

207. Our modified local TV ownership rule will ensure that there are at least six firms in significant number of markets (*i.e.*, all markets with 12 or more television stations), much like CFA's proposal. CFA's proposal does not, however, adequately address record evidence of differences in the economics of broadcast stations in smaller markets. Much like the strict application of the *DOJ/FTC Merger Guidelines* discussed earlier, CFA's proposed test would prohibit certain mergers that will result in welfare enhancing efficiencies. Accordingly, we decline to adopt CFA's proposal. With regard to CFA's waiver proposal, we do not agree that conditioning assignments/transfers on retention of separate news departments within separate subsidiaries of a merged entity is necessary to advance our diversity, competition or localism goals. Requiring compliance with our rules, rather than conducting case-by-case evaluations or imposing merger conditions, is a more effective way to achieve these goals.

208. Entravision does not take a position on whether the rule should be relaxed, but proposes that if the rule is relaxed, the Commission should require periodic certification by owners of same-market combinations that they are not engaged in certain types of anticompetitive conduct that would adversely affect smaller broadcasters in their markets.[438] We do not agree with Entravision that modifying the local TV ownership rule will

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[437] *Id.* at 284-85. Combinations resulting in moderately concentrated markets also would be subject to a *de minimis* exception under which market participants could acquire small firms (*i.e.*, those with a market share of less than 2%). *Id.* at 288.

[438] Entravision Comments at 8-10. Entravision makes the same proposals with regard to relaxation of cross-ownership rules. Id. These certifications would be required in connection with license renewals, applications for assignment or transfer of control of a license, and at license mid-term when stations' EEO compliance is reviewed.

increase the likelihood of anticompetitive conduct by broadcasters that own more than one station in a market, or that a certification requirement is necessary to protect against such conduct. Certainly, if broadcasters engage in anticompetitive conduct that is illegal under antitrust statutes, remedies are available pursuant to those statutes. In addition, an antitrust law violation by a licensee would be considered as part of our character qualifications review in connection with any renewal, assignment, or transfer of a license.

(ii) Proposals to Eliminate or Substantially Modify the Rule

209. Several commenters propose that we eliminate the current rule or substantially modify the rule in order to permit more same-market combinations.[439] Among these are a proposal to allow common ownership of two television stations in all markets with four or more stations, a proposal to eliminate the top four-ranked standard, a proposal to eliminate the voice test provision of the rule but to retain the top four-ranked restriction, NAB's proposed "10/10" standard, and Hearst-Argyle's AMI proposal. Below, we discuss these proposals.

210. We do not agree with several commenters who propose that we eliminate all local television ownership restrictions.[440] As we explained above, the public is best served when numerous rivals compete for viewing audiences. In the DVP market, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. Monopolists, on the other hand, profit only by attracting new

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[439] *See generally*, Alaska Comments; Belo Comments; Duhamel Comments; Emmis Comments; Fox Comments; Granite Comments; Gray Comments; Hearst-Argyle Reply Comments; Media General *et al.* Comments; Paxson Comments; Sinclair Comments; Westwind Reply Comments.

[440] *See* Alaska Comments at 2, 6-7; Fox Comments at 2-3, 6, 33-34, 58-59; Gray Comments at 6, 19; Media General *et al.* Comments at 2, 8; Sinclair Comments at i-iii, 8-9, 60.

audiences; they do not profit by attracting existing audiences away from their other programs. The additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by viewers.[441] Most commenters proposing elimination of the rule believe that antitrust authorities will protect against any public interest harms that may result from combined ownership of multiple television stations in a market. As we explain at Section III(B) above, we do not agree with commenters who urge us to eliminate our rules and defer all competition concerns to the antitrust authorities.

211. We conclude that, as compared to the modified rule, the rule modification proposals advanced by commenters are more likely to result in anomalies and inconsistencies, or will otherwise fail to serve our policy goals. For example, by proposing that we permit common ownership of two television stations in all markets with four or more stations, Nexstar attempts to account for the differing economics of stations in small markets.[442] However, unlike our modified rule, the Nexstar proposal does not protect against combinations of the market participants with the largest audience shares, combinations that are more likely to cause competitive harms. It also permits extremely high concentration levels in the very smallest markets—there could be as few as two competitors in markets with four television stations. We find that the levels of concentration permitted by the Nexstar proposal are likely to result in harm to competition in local DVP markets.

212. Similar competitive harms would result if we adopted proposals to eliminate or modify the top four-ranked

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[441] For a discussion of program provision under different market structures, *see*, Steiner, *supra* note 403; MOWG Study No. 6 at 3-5; Sinclair Comments, Baumann/McAnneny Statement at 2-6.

[442] Nexstar Comments at 15, 21.

standard.[443] Emmis claims that the top four-ranked standard cannot be justified on diversity or competition grounds.[444] Several commenters agree.[445] We are not relying on the top four-ranked provision of our modified local TV ownership rule to promote diversity, although we recognize that because the marketplace for ideas is broader than the DVP market, rules intended to promote competition also will promote diversity. We disagree with commenters' claims that the top four-ranked standard is not justified on competition grounds. At the time of

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[443] *See* Emmis Comments at 23-33; Fox Comments at 50; Sinclair Comments at 41-46; Letter from Howard M. Liberman, Drinker Biddle & Reath, counsel for Nexstar, to Marlene H. Dortch, Secretary, FCC (May 29, 2003) ("Nexstar May 29, 2003 Ex Parte"); Letter from Gary R. Chapman, President, LIN Television Corporation, Paul H. McTear, President & CEO, Raycom Media, Inc., Bernard E. Waterman, President & Director Waterman Broadcasting Corporation, and Lara Kunkler, President and General Manager, Montclair Communications, Inc., to Marlene H. Dortch, Secretary, FCC (May 15, 2003); Letter from Robert A. Beizer, Vice President of Law & Development, Gray Television, Inc., to Marlene H. Dortch, Secretary, FCC (May 29, 2003) ("Gray May 29, 2003 Ex Parte"); Letter from Jack N. Goodman, Senior Vice President and General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC (May 22, 2003) ("NAB May 22, 2003 Ex Parte") (proposing a tiered approach which would prohibit top four-ranked combinations in DMAs 1-25, top three-ranked combinations in markets 26-75, and top two-ranked combinations in markets 76-210); *Duopoly Relief Needed – 4th Ranked Stations Significantly Trail 3rd Ranked Stations*, Bear Stearns (May 29, 2003) (proposing a top three-ranked standard) ("Bear Stearns May 29, 2003 Ex Parte").

[444] Emmis Comments at 23-33. Emmis states that it has a temporary waiver authorizing its ownership of two television stations in the Honolulu, Hawaii DMA. Emmis Comments at 2. The top four-ranked standard prohibits Emmis' permanent ownership of this combination.

[445] *Fox Top Four Study*, *supra* note 417 (asserting that the top four restriction incorrectly seeks to promote diversity based on an unsupported assumption that top four-ranked stations are more likely to offer local news, although numerous stations that are not among the top four-ranked actually air local news); Sinclair Comments at 41-46, Exhibits 22-23 (asserting that if the intent of local TV rule is to prevent combinations involving stations that offer local news, the should do so explicitly because there is no empirical basis for view that only top four offer local news). *See also* note 446, *supra*.

our last review of the local TV ownership rule, we lacked sufficient record data concerning competitors to local television stations.[446] In the instant proceeding, we face no such shortage of evidence concerning which media compete with local TV. Having determined that television competes with all providers of DVP, we have crafted a rule that appropriately takes account of competition from other sources of DVP, and will ensure competition in local DVP markets. We do not agree that elimination of our top four-ranked standard, use of a top three-ranked standard,[447] or use of a tiered system that would ban mergers among top four-ranked stations only in the largest markets and permit certain top four-ranked combinations in smaller markets,[448] would serve the public interest. As discussed above, top four-ranked combinations are likely to harm competition in the DVP market,[449] and are less likely to produce offsetting public interest benefits.[450]

213. We believe that a more targeted approach to account for possible harms of application of the top four-ranked restriction is to establish a waiver standard tailored to the top four-ranked restriction. This approach will preserve competition in the DVP market while accommodating those instances where application of the top four-ranked restriction would harm the public interest. We discuss modifications to our current waiver standard in a separate section below.

214. Belo takes a nearly opposite approach, proposing that we permit same-market combinations provided that they satisfy our top four-ranked standard, but eliminate our voice test.[451] We agree that, as it is used in our modified rule, a top four-

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[446] Emmis Comments at 31-32.

[447] Bear Stearns May 29, 2003 Ex Parte.

[448] NAB May 22, 2003 Ex Parte.

[449] *See supra* ¶¶ 195-200.

[450] *See supra* ¶¶ 198-199.

[451] Belo Comments at ii-iii.

ranked prohibition is an appropriate means of protecting against combinations that would have an enhanced ability or incentive to engage in anticompetitive conduct.

215. NAB proposes that we permit combinations where at least one of the stations has had, on average over the course of a year, an all day audience share of ten or less (the "10/10" proposal).[452] NAB asserts that the audience share data used for this calculation should include viewing of out-of-market broadcast stations and cable networks, to account for competition from these sources.[453] NAB proposes that we treat the 10/10 standard as a presumption, and urges us to consider proposed combinations that do not meet this standard (including same-market combinations of three stations) on a case-by-case basis, considering factors which we discuss further below along with other waiver proposals.[454] NAB asserts that its proposed test would be easy for applicants to use and for the Commission to apply, would provide needed financial relief for struggling stations in small and medium markets and those that are lower-rated, and, by prohibiting combinations of leading stations, would effectuate our diversity and competition goals.[455] According to NAB, a ten viewing share effectively separates market leading stations from non-leading stations on a consistent basis across DMAs of varying size.[456] NAB urges the Commission to allow broadcasters to transfer combinations created pursuant to the 10/10 standard even if one or both stations has increased its viewing share

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[452] NAB Comments at 79.

[453] *Id.*

[454] *Id.*

[455] *Id.* at 79-81.

[456] *Id.* 81-82. NAB further asserts that the proposal will advance our localism goal by preserving struggling stations and by enhancing stations' financial viability, which will enable them to continue or initiate local news programming. *Id.* at 82-83.

above the ten threshold at the time of such transfer.[457] NAB asserts that requiring licensees to find separate purchasers will be disruptive and will tend to discourage investment in broadcast stations. Of the commenters who support the 10/10 proposal, some support the proposal as advanced by NAB; others support it with modifications; others suggest it be used only as a safe harbor, allowing for many other types of combinations.[458]

216. Although it supports the 10/10 proposal, Hearst-Argyle asserts that the most important deficiency of the proposal is that there is little record support for NAB's contention that ten is an ideal "cut-off point" between leading stations and others. Similarly, UCC states that in many markets, ten is the average share for any given broadcast station, and is not a dividing line between leading and struggling stations.[459] UCC contends that NAB has not shown that all, or even most, stations with a viewing share under ten are struggling to achieve financial viability.[460] UCC asserts that, to the contrary, 10/10 will permit common ownership of top-ranked stations in many markets.[461]

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[457] *Id.* at 83-84.

[458] Coalition Broadcasters Comments at 11-12; Desmond Reply Comments at 8; Duhamel Comments at 2; Gray Reply Comments at 6-7; Hearst-Argyle Reply Comments at 10-11; Pappas Comments at 13-15; Paxson Comments at 30-31; Westwind Reply Comments at 3. Coalition Broadcasters suggest modifying the proposal to establish a threshold share as high as 15 instead of ten for combinations in smaller markets. Coalition Broadcasters Comments at 11-12. Desmond urges us to adopt the proposal but to rely on audience share data that does not include out-of-market or non-broadcast viewing. Desmond Reply Comments at 8. Gray and Paxson support the 10/10 proposal as an alternative to eliminating the current local TV rule. Gray Reply Comments at 6-7; Paxson Comments at 30-31. Sinclair opposes the proposal but suggests that it could serve instead as a safe harbor. Sinclair Reply Comments at 5.

[459] UCC Comments at 20-21, Exhibit 1.

[460] UCC further contends that NAB has not shown that allowing such combinations will benefit the public. UCC Comments at 21, 23. UCC asserts that, to the contrary, such combinations will result in significant harm

217. The record in this proceeding supports a rule that will allow financially weak stations to combine with each other or with stronger stations in order to realize efficiencies. We have identified several benefits of such combinations. The 10/10 proposal, however, would permit mergers between financially strong stations, including top four-ranked stations, in a significant number of markets. Neither the record nor standard competitive analysis justifies a rule that will permit such mergers. Our analysis suggests that combinations among the top four rated broadcast stations would create welfare harms. We also agree with commenters who contend that the proposal does not adequately justify the use of ten as a threshold. The record demonstrates that in many markets ten is the average share for any given station, sometimes even the very highest rated stations, in the market. In addition, the proposal provides no clear rationale to justify why, for example, a combination involving two stations with respective audience shares of 25 and 9 should be permitted, although a combination involving two stations with respective audience shares of 12 and 11 should be prohibited. For these reasons, we reject the 10/10 approach.

218. Hearst-Argyle advances an alternative proposal.[462] Hearst-Argyle's proposal would permit common ownership of any number of television stations in the same market provided that the stations' combined audience share does not exceed 30%.[463] Combinations that would result in an audience share

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to diversity in local markets. *Id.* at 17-20.

[461] UCC Comments at 18, Exhibit 1. As an example, UCC states that only one station in the San Francisco, California DMA has had an average viewing share of ten or more in the past four Nielsen books, which means that, under 10/10, a single entity could combine the top two-ranked stations in the market. *Id.* Similarly, in the Washington, D.C. DMA, three of the four top rated stations have average viewing shares below or near 10. *Id.*

[462] Hearst-Argyle Reply Comments at 13-19.

[463] *Id.* at 14.

above 30% would be subject to an Audience Market Index ("AMI") cap that is calculated in a manner similar to an HHI, but uses audience share data rather than advertising share data.[464] If a combination would result in AMI below 1000, the combination would be permitted, regardless of the increase in concentration.[465] A combination resulting in an AMI between 1000 and 1800 would be permitted if the increase in AMI is less than 100 points, and a combination resulting in an AMI above 1800 would be permitted only if it increases AMI by less than 50 points.[466] Hearst-Argyle asserts that by using an audience share metric, its proposal objectively measures and protects both diversity and competition.[467] Hearst-Argyle contends that its proposal also is likely to survive judicial scrutiny because its 30% hard cap and AMI analysis are both based on antitrust law and analysis.[468] In addition, Hearst-Argyle contends that its proposal avoids several pitfalls of the NAB 10/10 proposal.

219. We do not agree with Hearst-Argyle that simply because courts have accepted presumptions of 30% market share as demonstrating market power in the context of the antitrust statutes, we should establish a presumption that 30% is an appropriate audience share limit. The Hearst-Argyle proposal does not place specific limits on the number of broadcast television stations an entity could own in a local market. An entity could acquire any combination of stations in

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[464] *Id.* at 14-16.

[465] *Id.* at 16.

[466] *Id.* at 16-17.

[467] *Id.* at 17-18. Hearst-Argyle notes that because all viewable channels are included in its analysis, its proposal reflects competition from viewing of cable channels.

[468] *Id.* at 18. Specifically, Hearst-Argyle states that its 30% cap derives from Supreme Court precedent (citing *U.S. vs. Philadelphia National Bank*, 374 U.S. 321, 364 (1963)) and notes that its AMI analysis is similar to DOJ antitrust analysis using the *DOJ/FTC Merger Guidelines*.

a local market as long as its audience share is 30 percent or less, and the AMI cap is satisfied. In many markets, this approach would permit an entity to own four, five, six or more stations. We do not believe that consolidation in a market of a large number of stations with low audience share is in the public interest. Although an individual station may currently have a small audience share in the DVP market, each station's audience share has the potential to change over time. The number of stations a firm owns is a measure of its capacity to deliver programming. This capacity can be as important a factor in measuring the competitive structure of the market as is its current audience share. Moreover, much like the 10/10 proposal, the AMI test will frequently result in common ownership of stations ranked among the top four in the market. It will also permit common ownership of three stations in many more markets than will our modified rule – including some very small markets. As shown by one of Hearst-Argyle's own examples, under certain circumstances, the AMI test would even permit common ownership of three of the top four-ranked stations in a market with just five full-power television stations.[469] Because of the anticompetitive harms that would result from combinations allowed by the AMI test, we will not adopt Hearst-Argyle's AMI proposal.

220. NAB proposes an alternative that would combine the 30% audience share cap of the AMI test with a ban on common ownership of more than three stations in any market, and a ban on common ownership of more than two top four-ranked stations in the same market.[470] For similar reasons, we do not accept this proposal. As discussed herein: (1) a ban on combinations among the top four-ranked stations is necessary to promote competition; (2) a 30% share cap would permit

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[469] *Id.*, Appendix at 1.

[470] Letter from Edward O. Fritts, President and CEO, NAB, to Marlene H. Dortch, Secretary, FCC (May 28, 2003).

combinations that undermine that goal; and (3) ownership of three television stations in markets with fewer than 18 stations would harm competition by consolidating capacity in the hands of too few owners. Our modified rule better effectuates our goal of promoting competition in local DVP markets.

b. Waiver Standard

221. In our *Local TV Ownership Report and Order*, we established a waiver standard for purposes of our local TV ownership rule. The standard permits a waiver of the current rule where a proposed combination involves at least one station that is failed, failing, or unbuilt. We define a "failed station" as one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings.[471] Our "failing" station standard provides that we will presume a waiver is in the public interest if the applicant satisfies each of the following criteria: (1) one of the merging stations has had low all-day audience share (*i.e.*, 4% or lower); (2) the financial condition of one of the merging stations is poor;[472] and (3) the merger will produce public interest benefits.[473] Our unbuilt station waiver standard presumes a waiver is in the public interest if an applicant meets

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[471] 47 C.F.R. § 73.3555, Note 7 (1).

[472] We have stated that a waiver is more likely to be granted where one or both of the stations has had negative cash flow for the previous three years. The applicant must submit data, such as detailed income statements and balance sheets, to demonstrate this. Commission staff evaluate the reasonableness of the applicant's showing by comparing data regarding the station's expenses to industry averages.

[473] For purposes of this criterion, we also stated that at the end of the stations' license terms, the owner of the merged stations must certify to the Commission that the public interest benefits of the merger are being fulfilled, including a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing. *Local TV Ownership Report and Order*, 14 FCC Rcd at 12939 ¶ 81.

each of the following criteria: (1) the combination will result in the construction of an authorized but as yet unbuilt station; and (2) the permittee has made reasonable efforts to construct, and has been unable to do so.[474] For each type of waiver, we also require that the waiver applicant demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to operate the subject station, and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station.[475] Any combination formed as a result of a failed, failing, or unbuilt station waiver may be transferred together only if the combination meets our local TV ownership rules or one of our three waiver standards at the time of transfer.[476]

222. Our rationale for adopting these waiver criteria was that failed, failing and unbuilt stations could not contribute to competition or diversity in local markets, and that the public interest benefits of activating a dark or unbuilt station, or preventing a failing station from going dark, outweighed any potential harm to competition or diversity.[477] Most commenters addressing the waiver standard urge us to relax or eliminate the standard. NAB urges the Commission to evaluate, on a case-by-case basis, combinations that do not meet its proposed local TV ownership rule.[478] For purposes of this case-by-case evaluation, NAB proposes that the Commission expand its

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[474] *Id.* at 12941 ¶ 86.

[475] 47 C.F.R. § 73.3555, Note 7. One way to satisfy this criterion is to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received. *Local TV Ownership Report and Order*, 14 FCC Rcd at 12941 ¶ 86.

[476] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12938-41 ¶¶ 77, 81, 86.

[477] *Id.* at 12941 ¶ 85.

[478] NAB Comments at 79-80. *See also* Gray Comments at ii (urging Commission to establish a flexible waiver standard should it retain any local TV ownership restrictions).

current waiver standard to include consideration of waivers that will facilitate a station's DTV transition or maintain existing local news operations.[479] Paxson agrees.[480] Pappas and NAB urge us to eliminate the requirement that the applicant demonstrate that there are no available out-of-market buyers for a subject station.[481] Coalition Broadcasters assert that the current "failing" station standard is too stringent to provide meaningful relief, and does not reflect market realities.[482] Coalition Broadcasters propose that we eliminate the current waiver standard and evaluate waivers on a case-by-case basis, considering factors such as the financial position of the station, penetration levels of other local media, levels of competition in local markets, and whether a combination will promote innovation.[483] Media General *et al.* urge us to allow transfer of combinations created pursuant to a waiver, even if the combination does not satisfy our local TV ownership rule or waiver standards at the time of transfer.[484] They assert that such transferability would encourage investment in failed, failing, or unbuilt stations.[485]

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[479] NAB Comments at 79-81; Pappas Comments at 14-15.

[480] Paxson Comments at 31. *See also* Gray May 29, 2003 Ex Parte (urging us to consider case-by-case waiver requests for combinations in small and medium markets).

[481] Pappas Comments at 14-15; NAB Comments at 80 n.148.

[482] Coalition Broadcasters Comments at 12-14. *See also* Alaska Comments at 2-3. Coalition Broadcasters contend that the failing station standard's focus on negative cash flow is misplaced, because other factors, such as excessive debt and interest obligations, also can cause a business to fail. Coalition Broadcasters Comments at 12-13. *See also* NAB Comments at 80 n.149 (urging the Commission to eliminate the requirement to demonstrate negative cash flow). Coalition Broadcasters also contend that 4% audience share does not reflect financial viability, and that many stations with higher audience shares also are failing. Coalition Broadcasters Comments at 12-13.

[483] Coalition Broadcasters Comments at 12-14.

[484] Media General *et al.* Comments at 7.

[485] *Id.*

223. UCC opposes relaxation of the current waiver standard, asserting that the relaxation proposals advanced by NAB and others will allow for many more combinations, thereby dramatically reducing viewpoint diversity in local markets.[486] UCC contends that a waiver standard connected to the DTV transition would only delay the DTV transition because it would give broadcasters an incentive to stall transitioning stations in order to qualify for a waiver.[487] CFA supports the adoption of a new case-by-case waiver standard that would allow applicants that do not meet its proposed local TV ownership restriction to obtain waivers if the Commission finds that the combination serves the public interest and if the new owner will preserve functionally separate news and editorial departments within separate subsidiaries.[488]

224. We conclude that tightening our waiver standard would not promote our public interest goals, as discussed below. Moreover, we agree with the NAB and other commenters who urge us to expand our waiver standard to include consideration of combinations that will yield other public interest benefits. Our treatment of waivers will follow the competition principles established in the *DOJ/FTC Merger Guidelines*, with a specific focus on the industry at hand. In particular, as in the *DOJ/FTC Merger Guidelines*, we will consider combinations that involve firms that are not failing but that could better serve the public interest through a merger not otherwise permitted by our rules.[489] We also will consider a waiver of our local TV ownership rule where a proposed combination involves stations that do not engage in head-to-head competition because they do not have overlapping Grade B contours and are not carried by MVPDs in the same geographic areas.

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[486] UCC Reply Comments at 23-26.

[487] *Id.* at 25-26.

[488] CFA Comments at 288.

[489] See the *DOJ/FTC Merger Guidelines* §§ 5.1, 5.2 (discussing mergers involving a failing firm and a failing division).

225. First, for failed, failing, and unbuilt stations, we retain the existing waiver standard with one exception. We remove the requirement that a waiver applicant demonstrate that it has tried and failed to secure an out-of-market buyer for the subject station. In many cases, the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. We agree with NAB that the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market.[490]

226. Otherwise, however, a failed, failing, or unbuilt station clearly cannot contribute to localism, competition or diversity in local markets. Nothing in the record in the instant proceeding leads us to find otherwise. We conclude that the public interest benefits of activating a dark or unbuilt station, outweighs the potential harm to competition or diversity. Therefore, if it can be shown that, absent the transfer, the licensee's assets will exit the market, then the transfer is not likely to either enhance market power or facilitate its exercise. In such cases, the granting of a waiver would not be inconsistent with our competition goal.

227. The record also suggests that local television stations outside the largest markets may, in some cases, better serve the public interest through station combinations not permitted by our local television ownership rules. Our new rules allow one company to own two stations in a market provided both are not ranked in the top four in ratings. This top four-ranked prohibition promotes competition by preventing the strongest competitors in each market from combining. The top four restriction is premised on evidence that the four leading stations in each market are already the strongest competitors and that combinations among them would harm the public interest by

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[490] NAB Comments at 80 n.148.

diminishing competition in the DVP market.[491] However, NAB data shows that, as a class, smaller market stations (including both top four and other stations) are less effective competitors in the DVP market relative to stations in large markets.[492] Therefore, we allowed station combinations that would not be permitted in larger markets. However, our concern for the economics of broadcast television in small market does not lead us to relax the top four prohibition generally because we concluded that this restriction remains necessary to promote competition in the DVP market. Nonetheless, we do recognize that there may be instances where application of this top four restriction will disserve the public interest by preventing marginal -- but not yet "failing" -- stations from effectively serving the needs of their communities. Such stations may not be financially capable of producing the amount of news and local affairs programming that they would like to provide their communities, which in turn may make them less competitive in the local marketplace. Accordingly, in order to effectuate our goals of diversity, localism, and competition, we will consider waivers of the top four-ranked restriction in markets with 11 or fewer television stations. Those are the markets in which we have already recognized that the economics of broadcast television justify relatively greater levels of station consolidation better serve the public interest.

228. In considering waivers of our top four-ranked restriction, we will consider a number of factors. For instance, mergers between stations that reduce a significant competitive disparity between the merging stations and the dominant station in the marketplace are particularly likely to be pro-competitive. Accordingly, waiver applicants should supply television ratings information for the four most recent ratings periods for all local

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[491] *See* ¶¶ 195-200, *supra*.

[492] NAB April 30, 2003 Ex Parte at 2, Chart 1.

stations so that we may assess the competitive effect of the merger.[493]

229. Second, we also will evaluate the effect of the proposed merger on the stations' ability to complete the transition to digital television. Waiver applicants claiming that the merger is needed to facilitate the digital transition should provide data supporting this assertion.

230. We also will consider the effect of the proposed merger on localism and viewpoint diversity. For instance, if both stations do not currently produce a local newscast, the merger is less likely to result in a reduction of viewpoint diversity than if both stations produce news. Similarly, a commitment that the merging parties will significantly increase news and local programming at one or both stations could result in a merger that increases localism and diversity from the status quo. Waiver applicants should submit information about current local news production for all stations in the local market and the effect of the proposed merger on local news and public affairs programming for the affected stations. Applicants stating that the merger is needed to preserve a local newscast should document the financial performance of the affected news division. Applicants for waiver of our top four-ranked restriction must demonstrate that the proposed combination will produce public interest benefits. As in the context of failing station waivers, we will require that, at the end of the merged stations' license terms, the owner of the merged stations must certify to the Commission that the public interest benefits of the merger are being fulfilled. This certification must include a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing. Finally, our review of waiver requests will account for the diminished reach of UHF stations. As discussed in our national television

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[493] *See, e.g.*, Gray May 29, 2003 Ex Parte.

ownership rule section, UHF stations reach fewer households than VHF stations because of UHF stations' weaker broadcast signals. Reduced audience reach diminishes UHF stations' impact on diversity and competition in local markets. Accordingly, we will consider whether one or both stations sought to be merged are UHF stations.

231. As explained above, our revised local TV ownership rule no longer permits combinations involving stations that do not have overlapping Grade B contours, on grounds that, because of statutory mandatory carriage requirements, most stations compete with each other on a DMA-wide basis. However, we recognize that certain stations are not carried throughout their assigned DMAs, and thus do not compete with each other within their assigned markets. Accordingly, we will consider waivers of our local TV ownership rule where a party can demonstrate that the signals of the stations in a proposed combination: (a) do not have overlapping Grade B contours; and (b) have not been carried, via DBS or cable, to any of the same geographic areas within the past year.

232. With respect to a licensee's ability to transfer or assign a combination involving a station acquired pursuant to a waiver, we do not find support in the record for permitting such transfers where they do not comply with our rules. The transfer or assignment of such a combination must comply with our rules or waiver standards at the time an application to transfer or assign the station is filed.

c. Satellite Stations

233. Television satellite stations retransmit all or a substantial part of the programming of a commonly owned parent station. Satellite stations are generally exempt from our broadcast ownership restrictions. The Commission first authorized TV satellite operations in small or sparsely populated areas with insufficient economic bases to support

full-service operations.[494] Later, we authorized satellite stations in smaller markets already served by full-service operations but not reached by major networks.[495] More recently, we authorized satellite stations in larger markets where the applicant has demonstrated that the proposed satellite could not operate as a stand-alone full-service station.[496] In the *Local TV Ownership Report and Order*, we retained our policy of exempting satellite stations from our local ownership rules.[497] We believe that continued exemption of satellite stations from the local TV ownership rule is appropriate. Our satellite station policy rests on such factors as the questionable financial viability of the satellite as a stand-alone facility, and establishment of service to underserved areas. By adding stations to local television markets where stations otherwise would not have been established, the policy advances the same goals as those underlying our local TV ownership restrictions. Since these stations are licensed only if they cannot survive as standalone, independently operated stations, we find that exempting them from the local TV ownership rule will not harm competition or diversity.

d. Transferability of Combinations Under Modified Rule

234. If an entity acquires a second or third station that complies with our modified rule, it will not later be required to divest if the number of stations in the market subsequently declines below the level consistent with our outlet cap, or if more than one commonly owned station subsequently becomes

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[494] *See, e.g., Authorization of UHF Stations*, 43 F.C.C. 2734 (1954).

[495] *See, e.g., Meyer Broadcasting Co.*, 67 F.C.C.2d 593 (1978), *aff'd mem. sub nom. Dickinson Broadcasting Corp. v. FCC*, 593 F.2d 1371 (D.C. Cir. 1979).

[496] *See Television Satellite Stations, Review of Policies and Rules*, 6 FCC Rcd 4212 (1991).

[497] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12943 ¶ 90.

a top four-ranked station in the market. The impact of such a "springing" rule would be highly disruptive to the market. Like our other rules, however, we will not ignore the public interest underpinnings at the time of a subsequent sale of the combination. Thus, absent a waiver, a combination may not be assigned or transferred to a new owner if the combination does not satisfy our local TV ownership cap at the time of the proposed assignment or transfer.

B. Local Radio Ownership Rule

235. The local radio ownership rule limits the number of commercial radio stations overall and the number of commercial radio stations in a service (AM or FM) that a party may own in a local market. Until 1992, parties were prohibited from owning two same-service (AM or FM) radio stations whose signal contours overlapped.[498] Although this rule effectively prevented radio station combinations from dominating a local radio market, it also prevented efficient radio station combinations from developing. As a result, in 1992, many radio stations were facing difficult financial conditions.[499] To address this concern, the Commission in 1992 relaxed the local radio ownership rule by establishing numerical limits on radio station ownership based on the total number of commercial radio stations in a market.[500]

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[498] Before 1989, the Commission relied on interference contours to determine whether two commonly owned radio stations implicated the rule. In 1989, the Commission began using principal community contours. In either case, parties could own a single AM-FM combination even if their contours overlapped. *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19863-64 ¶¶ 5-7.

[499] *See 1992 Radio Ownership Report and Order*, 7 FCC Rcd at 2757-60 ¶¶ 4-10.

[500] Under the 1992 rules, a party could own 2 AM and 2 FM radio stations in markets with 15 or more commercial radio stations, and three radio stations (of which no more than 2 could be AM or FM stations) in smaller markets. The 1992 rule also imposed an audience share limit on radio station combinations in the larger market. *See* 47 C.F.R. § 73.3555(a)(1)

236. In the 1996 Act, Congress directed the Commission to revise those limits to provide that: (1) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); (2) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM); (3) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and (4) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.[501] Those revisions, along with the simultaneous repeal of national limits on radio station ownership,[502] enabled greater consolidation of radio stations in local and national markets. Currently, there are, on average, approximately 10 radio station owners in local markets,[503] and the largest radio station operator, Clear Channel Communications, owns over 1200 radio stations nationwide, representing approximately 10% of the radio stations in the United States.[504] As a result of this consolidation, the radio industry today is on a stronger financial footing than it was a decade ago.[505]

(1995).

[501] 1996 Act, § 202(b).

[502] *See id.*, § 202(a).

[503] *See* MOWG Study No. 11, Radio Industry Review 2002: Trends in Ownership, Fornat, and Finance by George Williams and Scott Roberts (Sept. 2002) at 7 ("MOWG Study No. 11").

[504] *Id.* at 4; *see also* http://www.clearchannel.com/radio/

[505] *See* MOWG Study No. 11 at 13-19.

237. The local radio ownership rule has not been altered since the 1996 Act was adopted. In the 1998 biennial review, the Commission concluded that the rule continued to be necessary in the public interest to preserve competition and diversity in local radio markets.[506] The Commission expressed concern, however, that the methodologies used to define radio markets and to count the total number of radio stations and the number of commonly owned radio stations in a radio market were producing irrational and inconsistent results.[507] The Commission therefore decided in the first biennial review to initiate a rulemaking proceeding to consider changes to those methodologies.[508] In the 2000 biennial review, the Commission endorsed the conclusions reached in the first biennial review with respect to the local radio ownership rule.[509]

238. As contemplated in the first biennial review, the Commission issued the *Radio Market Definition NPRM* in December 2000 to consider changes to the way we define radio markets and calculate the number of radio stations in a market.[510] In November 2001, the Commission issued the *Local Radio Ownership NPRM*, which initiated a broader inquiry into the effect of consolidation in local radio markets and possible changes to local radio ownership rules and policies to reflect the current radio marketplace.[511] These two proceedings (collectively, the "*Radio NPRMs*") are still pending and have been incorporated into this 2002 biennial review proceeding.

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[506] *1998 Biennial Review Report*, 15 FCC Rcd at 11090-91 ¶ 59.

[507] *Id.* at 11091-94 ¶¶ 61-68.

[508] *Id.* at 11094 ¶ 68.

[509] *2000 Biennial Regulatory Review*, 16 FCC Rcd 1207, 1218 ¶ 32 (2001); *see also 2000 Biennial Regulatory Review*, Staff Report, 15 FCC Rcd 21084, 21145-46 (2000).

[510] *Definition of Radio Markets*, *supra* note 8.

[511] *Local Radio Ownership NPRM*, *supra* note 8.

239. We conclude that the numerical limits in the local radio ownership rule are "necessary in the public interest" to protect competition in local radio markets. We conclude, however, that the rule in its current form does not promote the public interest as it relates to competition because (1) our current contour-overlap methodology for defining radio markets and counting stations in the market is flawed as a means to protect competition in local radio markets, and (2) the current rule improperly ignores competition from noncommercial radio stations in local radio markets. To address those concerns, we modify the rule to replace the contour-overlap market definition with an Arbitron Metro market and to count noncommercial stations in the radio market; and we initiate a new rulemaking proceeding as part of this item to define markets for areas of the country where Arbitron Metros are not defined. Although we primarily rely on competition to justify the rule, we recognize that localism and diversity are fostered when there are multiple, independently owned radio stations competing in the same market; our competition-based rule, therefore, will also promote those public interest objectives. We also conclude that, consistent with our focus on competition, joint sales agreements ("JSAs") will result in attribution of the brokered station to the brokering party under certain conditions.

1. Section 202(h) Determination

240. Under Section 202(h), we consider whether the local radio ownership rule continues to be "necessary in the public interest as a result of competition." In determining whether the rule meets that standard, we consider whether the rule serves the public interest, which, in radio broadcasting, traditionally has encompassed competition, localism, and diversity.[512] We examine each of these public interest objectives in turn.

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[512] *Fox Television*, 280 F.3d at 1042.

a. Competition

241. In the Policy Goals section, we explained how the public interest is served by preserving competition in relevant media markets. Although limits on local radio ownership are generally necessary to serve public interest, we conclude that the current local radio ownership rule does not serve the public interest as it relates to competition for two reasons. First, the current rule uses a methodology for defining radio markets and counting the number of radio stations in a market that has not protected against undue concentration in local radio markets. Second, the current rule fails to account for the competitive presence of noncommercial stations in a market. We accordingly modify the rule to address these concerns.

(i) Product market definition

242. To measure the state of competition in radio broadcasting, we first must determine the relevant product markets in which radio stations compete and the other media, if any, that compete in those markets.[513] We conclude that radio broadcasters operate in three relevant markets: radio advertising, radio listening, and radio program production.

243. *The Radio Advertising Market.* We conclude that advertisers do not view radio stations, newspapers, and television stations as substitutes.[514] A number of commenters

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[513] A product market includes identical products, products with such negligible differences that buyers regard them as substitutes, and other products that buyers regard as such close substitutes that a slight price increase in one will induce shifts of demand away from the other. *See DOJ/FTC Guidelines.*

[514] MOWG Study No. 10 at 12; *see also United States v. Jacor Communications Inc.*, 1996 WL 784589, *10 (S.D. Ohio 1996) (advertisers perceive radio as a distinct advertising medium from television or newspapers); Robert Ekelund, George Ford, and John Jackson, *Is Radio Advertising a Distinct Local Market? An Empirical Analysis*, 14 REV. INDUS. ORG. 239 (1999) (radio advertising constitutes a distinct market). By definition, noncommercial radio stations do not compete in the radio advertising market.

have argued that there is little substitution between advertising on broadcast TV and newspapers. For example, CWA urges the Commission to adopt local ownership rules that treat TV, newspapers, and radio as separate local product markets.[515] This conclusion is consistent with MOWG Study No. 10, which found "weak substitutability" among various local media outlets for purposes of local advertising sales.[516] It is also consistent with antitrust cases filed by the Department of Justice, in which it has alleged that radio advertising constitutes a separate antitrust market.[517] Thus, at least in terms of their revenue generating "customers," radio advertising, newspaper advertising, and television advertising make up distinct product markets.[518]

244. Further, other empirical studies confirm that advertisers do not view ads in newspapers and broadcast radio as substitutes. Authors Alvin Silk, Lisa Klein, and Ernst Berndt (2002) examine advertising substitution among eight media in the national markets.[519] They report only weak substitution between newspapers and other media. Reid and King (2000) conducted a study based on interviewing and surveying advertising managers in national markets and concluded that

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[515] CWA Comments at 13-16.

[516] MOWG Study No. 10 at 12. For a technical discussion of MOWG Study No. 10, see Appendix E.

[517] *See, e.g.*, Complaint ¶¶ 11-14, United States v. Clear Channel Communications, No. 1:00CV02063 (D.D.C. filed Aug. 29, 2000); Complaint ¶ 12, United States v. EZ Communications, Inc., No. 1:97CV00406 (D.D.C. filed Feb. 27, 1997).

[518] Various commenters have argued that other types of advertising – such as billboards and telephone directories – also are in the same product market with radio advertising. There is, however, no evidence in the record or in the academic literature to support that argument.

[519] Alvin J. Silk, Lisa R. Klein, and Ernst R. Berndt, *Intermedia Substitutability and Market Demand by National Advertisers*, REV. INDUS. ORG. 323-348 (June 2002).

these managers did not view radio as a good substitute for other media in advertising.[520] The evidence presented in MOWG Study No. 4 also suggests that advertisers do not substitute perfectly between radio and other forms of media.[521] We acknowledge that the studies discussed in this paragraph focus on national advertising markets.[522] Nothing has been submitted

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[520] Leonard N. Reid and Karen Whitehill King, *A Demand-Side View of Media Substitutability in National Advertising: A Study of Advertiser Opinions about Traditional Media Options*, 77(2) J MASS COMM Q 292-307 (Summer 2000).

[521] MOWG Study No. 4, Consolidation and Advertising Prices in Local Radio Markets by Keith Brown and George Williams (Sept. 2002) ("MOWG Study No. 4"). The authors report that increases in concentration in the radio market contributes to a modest increase in radio advertising prices. This evidence of market power suggests that advertising on radio is not a perfect substitute with advertising on other media. Dean Baker, in comments submitted by AFL-CIO, criticizes MOWG Study No. 4 for concluding that income growth was the main factor behind the sharp surge in ad prices following the relaxation of radio ownership rules. He argues that misspecification of the model may have led to understating the effects that concentration has on radio advertising prices. We do acknowledge, as Baker argues, that the authors did not include years prior to the 1996 Act that might help establish the relationship between concentration in the radio market and prices in radio advertising. There is, therefore, a possibility that MOWG Study No. 4 understates the effect that ownership concentration in local radio markets has on radio advertising prices. But any such understatement would only lend further support to our conclusion that radio advertising is a separate product market.

[522] *See, e.g.*, Clear Channel Comments, Statement of Professor Jerry A. Hausman, at 12-17. Hausman also argues that the regressions conducted in MOWG Study No. 4 did not include the prices of broadcast television, newspaper, and cable advertising and therefore the coefficients found on the measures of concentration are unreliable, that the result is not robust when other measures of concentration are used, and that the size of the coefficient that Brown and Williams report does not warrant concern. As to the first point, the staff has found that the results of MOWG Study No. 4 were not significantly changed when the price of broadcast television was added to the regression. We believe, therefore, that the findings presented by MOWG Study No. 4 are robust even if other media are included. As to the remaining two points, the MOWG Study's use of natural logarithms of the HHI is

in the record, however, that suggests that local advertisers are better able to substitute between radio and other media than are national advertisers, and the studies' results are consistent with the results of MOWG Study No. 10, which did examine local advertisers.

245. *The Radio Listening Market.* We conclude that radio listening is a relevant product market.[523] There is no evidence that radio listeners consider non-audio entertainment alternatives (*e.g.*, reading and watching television) to be good substitutes for listening to the radio. We therefore disagree with commenters that argue that the relevant market should be broadened from radio listening to include non-audio entertainment options.[524] We also disagree with commenters who argue that the relevant product market should be broadened to include other delivered audio media, such as Internet audio streaming and satellite radio.[525] Internet audio streaming may be a substitute for broadcast radio when

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consistent with a widely examined class of economic models, and, although Hausman is correct that the study reports a small coefficient, we believe that a small, statistically significant coefficient is sufficient to support our conclusion of imperfect substitution between radio advertising and other markets.

[523] The relevant product market includes "all products 'reasonably interchangeable by consumers for the same purposes.'" *United States v. E.I du Ponte de Nemours & Co.*, 351 U.S. 377, 395 (1956).

[524] In defining the relevant product market for merger analysis, one starts with the products supplied by the merging firms and asks whether a monopolist, supplying those products, would profitably impose "a small but significant and non-transitory price increase." If the monopolist would not be able to impose such a price increase, then one adds in the next closest substitute to the products of the merging firms and repeats the experiment. Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, at http://www.usdoj.gov/atr/hmerger/11256.htm (visited Mar. 20, 2003). This approach has been referred to as the "smallest market principle."

[525] Murphy Comments in MM Docket No. 00-244 at 3; Jimcar Comments in MM Docket No. 00-244 at 1.

listening takes place while working on a computer or in a small office environment. A significant portion of audio listening, however, occurs while driving or otherwise outside of the office or home.[526] Since most people do not access Internet audio from a mobile location, we conclude that Internet audio streaming is not a substitute for broadcast radio for a significant portion of audio listening.[527] Similarly, satellite radio may be a substitute for broadcast radio for the fewer than 600,000 people that subscribe to satellite radio.[528] But the vast majority of the population does not subscribe to a satellite radio service.[529] Accordingly, we conclude that satellite radio is not yet a good substitute for broadcast radio for most listeners.

246. Preserving competition for listeners is of paramount concern in our public interest analysis. Although competition in the radio advertising market and the radio program production market indirectly affect listeners by enabling radio broadcasters to compete fairly for advertising revenue and programming – critical inputs to broadcasters' ability to provide service to the public – it is the state of competition in the listening market that most directly affects the public. When that market is competitive, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. Monopolists, on the other hand, profit

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[526] *See Arbitron, Radio Today: How America Listens to Radio* (2003) at http://www.arbitron.com/downloads/ radiotoday03.pdf ("*Radio Today*").

[527] *See* MMTC Comments in MM Docket No. 01-317 at 13-14 n.23 ("availability of the Internet has been overstated"); MMTC Reply Comments in MM Docket No. 01-317 at 31 (Internet radio occupies only about 4% of radio listening at home and work); UCC Comments in MM Docket No. 01-317 at 9 (Internet radio, which requires the use of a computer and modem does not offer the benefit of mobility, and cannot reach the mobile users).

[528] *See supra* ¶ 127. In contrast, local radio stations reach approximately 94% of the U.S. population each week. *See Radio Today*, *supra* note 529 at 3.

[529] UCC Comments in MM Docket No. 01-317 at 11; MMTC Comments in MM Docket No. 01-317 at 32.

only by attracting new audiences; they do not profit by attracting existing audiences away from their other programs. Because the additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by existing listeners,[530] it is critical to our competition policy goals that a sufficient number of rivals are actively engaged in competition for listening audiences. Limits on local radio ownership promote competition in the radio listening market by assuring that numerous rivals are contending for the attention of listeners.

247. *Radio Program Production Market.* Radio stations seek to acquire audio programming from a variety of audio program producers. Many sellers of audio programming do not have adequate substitutes for local radio stations. The record indicates that radio stations are an important mechanism by which the American public is made aware of new music.[531] Moreover, the record suggests no reasonable alternative available to producers of radio talk shows – a type of radio programming that has become increasingly popular in the last decade.[532] To the extent that the radio stations in a local community are owned by one or a few firms, those firms could constitute a bottleneck that would impede the ability of radio programming producers to make their programming available to consumers in that community. Accordingly, we conclude that radio programming constitutes a separate relevant product market.

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[530] For a discussion of program provision under alternative market structures, see, Steiner, *supra* note 403; MOWG Study No. 6 at 3-5; and Sinclair Comments, Baumann/ McAnneny Statement at 2-6.

[531] *See* Future of Music Coalition Comments, *Radio Deregulation: Has It Served Citizens and Musicians*, at 61-67; AFTRA Comments in MM Docket No. 01-317 at 12-14.

[532] *See* NAB Comments in MM Docket No. 01-317 at 19; NAB Reply Comments in MM Docket No. 01-317 at 8-9.

(ii) Geographic Market Definition

248. Competition analysis requires that we determine the relevant geographic market in which radio stations compete. There is no serious dispute that the relevant geographic market for the product markets in which radio stations compete is local: advertisers and program producers seeking to reach listeners in a local community cannot readily substitute radio stations (or any other media) that do not serve that community for the local radio stations that do. The parameters of the local market, however, have been a source of considerable debate and controversy.[533] We currently use a contour-overlap methodology for defining radio markets and determining the number of radio stations that are in those markets.[534] That methodology has been subject to intense criticism for producing unrealistic and irrational results, which in turn lead the Commission to issue two separate rulemaking notices – the *Radio NPRMs* – to examine the problems associated with the contour-overlap system in greater detail.

249. We have examined the record developed from the *Radio NPRMs* in conjunction with our overall biennial review of the media ownership rules. Based on the record and our own experience, we now conclude that the contour-overlap system should be replaced by a more rational and coherent methodology based on geographically-determined markets to promote more effectively our competition policy goals.

(a) Problems with the Existing Radio Market Definition and Counting Methodologies

250. We currently rely on the principal community contours of the commercial radio stations that are proposed to be commonly owned to determine the relevant radio market in

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[533] *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19862-70 ¶¶ 3-18.

[534] See Appendix F for a more detailed explanation of the current contour overlap methodology.

which those stations participate and to count the other radio stations that are in the market.[535] We first consider whether an area of overlap exists among the principal community contours of all of the stations proposed to be commonly owned. If no such overlap area exists, then the radio stations involved are presumed to be in separate radio markets, and the local radio ownership rule is not triggered. If one or more areas of contour overlap exist, however, the rule is triggered,[536] and we must determine whether the proposed combination complies with the limits specified in the rule.

251. We first ask how many stations a party would own in the relevant radio market (*i.e.*, the "numerator" of the fraction upon which the numerical limits in the local radio ownership rule are based). Under our current methodology, we deem the radio stations whose principal community contours mutually overlap to be in the same market, and we deem those stations to be the only stations owned by the common owner in that market. In some instances, a radio station's principal community contour will overlap some, but not all, of the principal community contours of other commonly owned radio stations. In those cases, separate radio markets will be formed from the mutual contour overlaps of different subsets of commonly owned radio stations. We nevertheless apply the same rule: In each of those separate markets, we deem the radio stations whose principal community contours mutually overlap to be in the same market, and we deem those stations to be the only stations owned by the common owner in that market.

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[535] The principal community contour for AM stations is the predicted or measured 5 mV/m groundwave contour and for FM stations is the predicted 3.16 mV/m contour. 47 C.F.R. § 73.3555(a)(3)(i).

[536] A single AM/FM combination is always permitted. 47 C.F.R. § 73.3555(a)(2) (overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.)

252. After calculating the numerator for a particular radio market, we next determine the size of the market (*i.e.*, the "denominator" in the fraction). To do this, we again rely on principal community contours. We count as being in the relevant radio market the radio stations that are included in the numerator. We add to this number every other commercial radio stations whose principal community contour overlaps the principal community contour of *at least one* of the stations counted in the numerator. The total represents the size of the market against which the number of commonly owned stations (*i.e.*, the numerator) is evaluated to determine whether the proposed combination complies with the local radio ownership rule.

253. One significant problem with the current contour-overlap system is what is known as the "Pine Bluff" problem, or the "numerator-denominator" inconsistency.[537] As explained above, a party is deemed to own only those stations that are represented in the numerator, *i.e.*, stations that have mutually overlapping principal community contours. In calculating the denominator, however, any radio station whose principal community contour overlaps the principal community contour of *at least one* of the radio stations in the numerator is counted as being in the market, regardless of who owns that station. As a result, the denominator may include radio stations that are owned by the same party that owns the radio stations represented in the numerator. Because those stations are counted in the denominator, they are by definition "in" the market, but they would not count against the party's ownership limit in that market unless their principal community contours overlap the principal community contours of all of the radio stations in the numerator.

254. The numerator-denominator inconsistency has two potential and interrelated effects that highlight the problems

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[537] *Application of Pine Bluff Radio, Inc. (Assignor) and Seark Radio, Inc. (Assignee)*, 14 FCC Rcd 6594 (1999).

with our current methodology. First, by counting commonly owned stations in the denominator that are not counted in the numerator, a party may be able to use its own radio stations to increase the size of the radio market and thereby "bump" itself into a higher ownership tier. Second (and more commonly), the inconsistency enables a party to own radio stations that are in the relevant radio market (as determined by our rules) without having those stations count against the party's ownership limit in that market.[538] The current system of counting radio stations thus enables a party, by taking advantage of the effects of the numerator-denominator inconsistency, to circumvent our limits on radio station ownership, which are intended to protect against excessive concentration levels in local radio markets.

255. We cannot fix the problems associated with our current methodology merely by excluding commonly owned stations from the denominator or including those stations in the numerator.[539] If we exclude commonly owned stations from the denominator, then we would be determining which radio stations are in the market based on who owns those stations, a distinction that would be both unprincipled and unprecedented in the history of competition analysis. If we include in the numerator commonly owned stations represented in the denominator, a party's ownership level in a particular market may be overly inflated by outlying stations far from the area of concentration.[540] Each of these proposals thus would create new "reverse" anomalies to cancel out the effects of the numerator-denominator inconsistency.

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[538] The first effect arises from *including* commonly owned radio stations in the denominator. The second effect arises from *excluding* those stations from the numerator.

[539] This is one of the options we suggested as a remedy for the "Pine Bluff" problem if we decided to retain a contour-overlap radio market definition. *See Radio Market Definition NPRM*, 15 FCC Rcd at 25077 ¶ 9.

[540] *See* Aurora Comments in MM Docket No. 00-244 at 20-22; NAB Comments in MM Docket No. 00-244 at 28.

256. Our experience with the current contour-overlap methodology leads us to the conclusion that it is flawed as a means to preserve competition in local radio markets, and that we should take an entirely new approach to market definition.[541] As is clear from our description of the current market definition and counting methodologies, the size of a radio market under our current system is unique to the proposed combination being evaluated. A different combination of radio stations, or the addition or subtraction of a radio station from the combination, has the potential to change the area covered by the principal community contours of the combination and, thus, to change the number of commercial radio stations that are counted as being in the market. This is a singular and unusual method for determining the size of a market. Under traditional antitrust principles, the "relevant geographic market" is used to identify the parties that compete in that market.[542] Our contour-overlap methodology, in contrast, uses the outlets of one party – commonly owned stations with mutually overlapping principal community contours – to define the local radio market and identify other market participants. This is an inherent aspect of the contour-overlap methodology that is not in line with coherent and accepted methods for

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[541] In light of our analysis, we reject the various proposals that some commenters have advanced to reform the contour-overlap system. *See, e.g.*, Main Street Comments in MM Docket No. 01-317 at 2 (proposing change to AM propagation standard); Davis Comments in MM Docket No. 01-317 at 3 (proposing change from principal community contour to interference standard).

[542] The DOJ identifies a relevant geographic market as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a "small but significant and nontransitory" increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change. *DOJ/FTC Merger Guidelines* § 1.21. This approach is consistent with the Supreme Court's definition of the relevant geographic market as the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." *United States v. Grinnell Corp.*, 348 U.S. 563, 588-89 (1966).

delineating geographic markets for purposes of competition analysis.

257. The conceptual problems with the contour-overlap methodology have significant implications for our ability to guard against undue concentration in local radio markets. Because radio stations with larger signal contours are more likely to reach a wider audience, consolidation of these radio stations in the hands of one or a few owners increases the potential for market power in local radio markets. Yet the contour-overlap system actually encourages consolidation of powerful radio stations because stations with larger signal contours are more likely to create larger radio markets, which make it more likely that a party would be able to acquire additional radio stations in that market.[543] Thus, by creating this perverse incentive, the contour-overlap methodology may undermine the primary public interest rationale for the local radio ownership rule.[544]

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[543] *See, e.g.*, Bear Stearns Ex Parte Presentation, *A Defining Moment in Radio?* by Victor B. Miller (May 12, 2003) at 10 ("*Defining Moment in Radio*").

[544] NAB proposes to limit the contour of Class A, AM stations for determining the number of stations that comprise a radio market to a non-directional 5-kilowatt facility (Regional Class B facility). *See* Letter from Jerianne Timmerman, NAB, to Marlene H. Dortch, Secretary, FCC (Jan. 24, 2003) ("NAB Jan. 24, 2003 Ex Parte"). Class A stations usually have very large principal community contours, which results in stations being counted in the market that may be very far away from the proposed combination of stations that define the market. Alternatively, NAB proposes to address the "large signal" anomaly by "excluding from the count of stations in a market any station – irrespective of service – whose transmitter site is more than 92 kilometers (58 miles) from the area of common overlap of the stations being acquired." *See* Letter from Edward O. Fritts, NAB, to Michael K. Powell, Chairman, FCC (May 23, 2003). Although either of these approaches could reduce the number of stations counted in a market, the problems with contour-overlap approaches are not limited to situations in which there is a large signal. However, as explained *infra* at ¶¶ 282-286 we adopt NAB's second proposal in the interim modified contour-overlap rule to be used for stations located outside of Arbitron Metro's until the completion of the

258. Other aspects of our contour-overlap methodology also limit its usefulness in protecting and promoting competition. The method for determining which stations are in a market often does not reflect the area of true competition among radio stations. We currently count a radio station as being a competitor in a radio market if its principal community contour overlaps any one of the principal community contours that form the market boundary. Those radio stations may be too distant to serve effectively either the listeners or the advertisers in the geographic area in which concentration is occurring, but they are included in the market because of the happenstance of the size, shape, or location of one or more of the principal community contours of the radio stations involved.

259. The contour-overlap methodology also makes it difficult to measure concentration levels in local radio markets accurately. As currently implemented, the methodology does *not* examine the number of radio station owners in a market; it only considers how many radio station signals cross the market boundary created by the principal community contours of commonly owned stations with mutually overlapping contours. Those signals may be owned by only one other party; indeed, because of the numerator-denominator inconsistency, those radio stations may be owned by the same party. The current methodology simply does not take ownership into account, which makes an accurate measure of local radio concentration difficult to achieve.

260. Consistency suffers as well. Under the contour-overlap methodology, every combination operates in a radio market that is unique to that combination.[545] Thus, there is no common metric that we can use to compare the effect of two different combinations on competition.[546] In fact, we cannot even

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rulemaking proceeding in Docket No. 03-130.

[545] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19880 ¶ 44; *Defining Moment in Radio* at 10.

[546] *See* NAB Comments in MM Docket No. 01-317 at 34 ("Utilizing a

rationally evaluate the effect that adding a new radio station to an existing combination would have on competition because the relevant radio markets before and after the acquisition may be completely different, depending on the vagaries of the contour overlaps.

261. Commenters nonetheless argue that we may not alter the market definition unless we conclude that the current market definition has caused actual harm to our public interest goals.[547] We do not agree that we must demonstrate actual harm to move from an irrational market definition to a rational one. Any analysis of the potential harms of concentration should be focused on the limits on how many stations a party may own in a market, rather than on whether a distorted methodology for defining radio markets and counting radio stations should be preserved.[548]

262. We recognize that our current view differs from what we stated in 1992 when we first adopted the contour-overlap methodology for defining radio markets and counting market participants.[549] At the time, however, the numerical limits prohibited station combinations in excess of 2 AM and 2 FM

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contour overlap method of market definition for competitive purposes would essentially require each applicant to submit a customized competition analysis based on the unique market created by every proposed transaction.").

[547] *See, e.g.*, NAB Comments in MM Docket No. 00-244 at 12-13, 28.

[548] In any event, the record does provide some evidence of potential competitive harm. MOWG Study No. 4 suggests that consolidation has resulted in an increase in advertising prices. *See* discussion of product market, Section VI(B)(1)(a)(i), *supra*. In addition, several smaller broadcasters have asserted that consolidation has created market power, which has resulted in significant harm to their ability to generate advertising revenue, to invest in improvements to radio service, and even to stay in business. *See* discussion of rejection of repeal and other modifications, Section VI(B)(1)(a)(iii)(b).

[549] *See 1992 Radio Reconsideration Order*, 7 FCC Rcd at 6394-96 ¶¶ 37-43.

stations, and imposed on top of that an audience share cap of 25% in the largest markets. Even though the problems with the contour-overlap system were present at the beginning, the effect was less evident because of the far more restrictive ownership limits. It was only after the ownership limits were substantially raised in the 1996 Act that the scope of the market distorting effects of that system became manifest. In light of this experience, it would be irresponsible for us to leave uncorrected our market definition and counting methodology.

263. In short, our experience with the contour-overlap system leads us to believe that it is ineffective as a means to measure competition in local radio markets, and that a different method of defining the market will more effectively serve our goals. We see scant evidence in the record to lead us to a different conclusion. Some commenters correctly note that any methodology we develop may create anomalous situations in certain instances.[550] But we cannot agree that our inability to achieve perfection in every instance justifies maintaining the current system. We conclude that our methodology for defining radio markets and counting market participants must be changed.

(b) Statutory Authority

264. Before explaining our modified market definition and counting methodologies, we address arguments that we lack the statutory authority to revise those methodologies in a way that would prohibit radio station combinations that are permissible under the current framework. After reviewing the relevant statutory provisions, we find that argument to be without merit.

265. The Communications Act grants us the authority to "[m]ake such rules and regulations, . . . not inconsistent with

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[550] *See, e.g.*, Cumulus Comments in MM Docket No. 01-317 at 15; Nassau Reply Comments in MM Docket No. 01-317 at 5; NAB Comments in MM Docket No. 00-244 at 5; MBC Comments in MM Docket No. 00-244 at 5; Cumulus Comments in MM Docket No. 00-244 at 5; Cox Comments in MM Docket No. 01-317 at 12.

law, as may be necessary to carry out the provisions of" the Act.[551] We also are authorized to "make such rules and regulations . . . not inconsistent with [the] Act, as may be necessary in the execution of [our] functions."[552] The Supreme Court has held that these broad grants of rulemaking power authorize us to adopt rules to ensure that broadcast station ownership is consistent with the public interest.[553] We find nothing in the 1996 Act or its legislative history that diminishes that authority.[554] To the contrary, Section 202(b) contemplated that we would exercise our rulemaking authority to make the revisions to the rule that Congress required, and Section 202(h) contemplates that we will exercise our rulemaking authority to repeal or modify ownership rules that we determine are no longer in the public interest. We accordingly find that we have the authority to revise the local radio ownership rule in a manner that serves the public interest.

266. Some commenters nevertheless argue that the 1996 Act restricts how we may define the "public interest." They contend that Congress specifically found the levels of radio station ownership specified in Section 202(b) to be in the public interest. Because Congress has specifically spoken, the argument goes, we no longer have the discretion to interpret the public interest in a manner that, in purpose or effect, precludes a radio station combination that complies with the numerical

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[551] 47 U.S.C. § 303(r).

[552] 47 U.S.C. § 154(i).

[553] *See, e.g., Storer Broadcasting*, 351 U.S. at 202-03.

[554] *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (statutory revisions are not presumed to change the law unless "an intent to make such a change is clearly expressed") (internal punctuation omitted). *Accord United States v. Wilson*, 503 U.S. 329, 336 (1992); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989). *See also* 1996 Act, § 601(c)(1), 110 Stat. 143 (1996 Act "shall not be construed to modify, impair, or supersede Federal . . . law unless expressly so provided").

limits of the current rule, as determined by the existing market definition and counting methodologies.[555]

267. We find that argument flawed. Even assuming *arguendo* the premise of the argument – that Congress intended Section 202(b) as a statement of the radio station ownership levels that would be conclusively consistent with the public interest – it does not follow that Congress intended that statement to remain true in perpetuity. In *Fox*, the court held, in the context of the national television ownership cap, that the numbers Congress selected "determined only the starting point" for analysis and instructed us not "to defer to the Congress's choice" of numbers in our analysis.[556] Thus, even if Congress believed in 1996 that Section 202(b) set the appropriate radio station ownership levels, *Fox* holds that we retain the authority – indeed, the obligation – to determine ourselves whether a change in the rules would serve the public interest.

268. In *Fox*, of course, the court was addressing whether we were required to defer to the ownership limits established in the 1996 Act in justifying retention of the national television ownership rule. But if *Fox* correctly held that we should not defer to the 1996 Act in deciding whether a rule continues to be in the public interest, we see no statutory basis to suggest that the 1996 Act in some way prevents us from changing the way we define radio markets or count radio stations.

269. Commenters arguing against our statutory authority place great weight on the *Fox* court's holding that Section 202(h) "carries with it a presumption in favor of repealing or modifying the ownership rules."[557] We recognize that the

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[555] *See, e.g.*, NAB Comments in MM Docket No. 01-317 at 7-10; Radio One Comments in MM Docket No. 01-317 at 4; Clear Channel Comments in MM Docket No. 01-317 at 10; Clear Channel Comments in MM Docket No. 01-317 at 2; NAB Reply Comments in MM Docket No. 01-317 at 3.

[556] *Fox Television*, 280 F.3d at 1043.

[557] *Id.* at 1048.

Section 202(h) presumption requires us to justify a decision to retain the rule. The purpose of the presumption is thus to shift the traditional administrative law burden from those seeking to modify or eliminate the rule to those seeking to retain it. It would be a substantial leap, however, to read this presumption as having the additional effect of limiting the types of changes that we may conclude are in the public interest.[558] We see no basis for such a view. Had Congress intended to curtail the Commission's regulatory powers so drastically, it would have done so in more express terms.[559]

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[558] Cox argues that the Commission found that it lacked statutory authority to change the local radio ownership rule in the *1998 Biennial Review Report*. Cox Comments in MM Docket No. 01-317 at 4. In that report, the Commission stated that tightening the ownership limits would be "inappropriate given that Congress directed the Commission to adopt these limits in 1996." 1998 *Biennial Review Report*, 15 FCC Rcd at 11091 ¶ 60. This statement does not speak to the Commission's authority; rather, it reflects the Commission's policy decision to "monitor . . . consolidation and gather information regarding the overall impact on competition and diversity" before considering changes to the limits established by Section 202(b). *Id.* at 11088 ¶ 53. *See also Fox Television*, 280 F.3d at 1042 (noting that the Commission had adopted a "wait-and-see" approach in the *1998 Biennial Review Report*). Indeed, in the same report, the Commission concluded that it should initiate a rulemaking proceeding to consider changes to the way markets are defined and radio stations counted, finding that the current "definitions and methodologies may be undermining Congress' intent." 15 FCC Rcd at 11091 ¶ 61. The Commission would not have taken this action if it had concluded that Section 202(b) foreclosed revisions that would make the local radio ownership rule more restrictive.

[559] *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 613 (1991) ("As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority [it has] granted . . . , we would have expected it to do so in language expressly describing [such] an exception . . . . If [a statute] had been intended to place [such an] important limitation . . . , we would expect to find some expression of that intent in the legislative history."); *cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 259 (1994) ("we find it most unlikely that Congress intended the introductory clause to carry the critically important meaning petitioner assigns it").

270. Invocation of the ratification, or reenactment, doctrine does not alter the analysis.[560] Under that doctrine, Congress is presumed to have adopted the settled judicial interpretation of a statute when it reenacts that statute.[561] "Congress' repetition of a well-established term [also] carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."[562] The ratification doctrine may not be invoked, however, where there is no "evidence to suggest that Congress was even aware" of an agency's position.[563] It is not enough for Congress to be presumed to know the law; Congress must make an "affirmative step" to ratify the agency's position.[564]

271. We conclude that the ratification doctrine is not applicable here. We find nothing in the 1996 Act or in its legislative history that evidences a congressional intent to adopt the market definition and counting methodologies that the Commission adopted in 1992. Contrary to certain commenters' arguments,[565] moreover, the Commission did not acquiesce to the ratification theory in 1996 by carrying forward these methodologies without notice and comment. The Commission merely noted that the revisions mandated by Section 202(b) did

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[560] *See, e.g.*, Clear Channel Comments in MM Docket No. 00-244 at 3.

[561] *See, e.g., Keene Corp.*, 508 U.S. at 208.

[562] *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

[563] *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (citing *United States v. Calamaro*, 354 U.S. 351, 359 (1959)).

[564] *International Union, UAW v. Brock*, 816 F.2d 761, 767 (D.C. Cir. 1987) (citing *SEC v. Sloan*, 436 U.S. 103, 121 (1978)). *Accord American Fed. of Labor and Congress of Indus. Orgs. v. Brock*, 835 F.2d 912, 915-16 (D.C. Cir. 1987).

[565] *See, e.g.*, Clear Channel Comments in MM Docket No. 01-317 at 9; Cox Comments in MM Docket No. 01-317 at 4; Cumulus Comments in MM Docket No. 01-317 at 4 n.2.

not directly affect the market definition and counting methodologies in the local radio ownership rule.[566]

272. Even if the ratification doctrine could be invoked, that would not "preclude [an] agency, in the exercise of its rulemaking authority, from later adopting some other reasonable and lawful interpretation of the statute."[567] The ratification doctrine "does not mean that the prior construction has become so embedded in the law that only Congress can effect a change," but permits changes "through exercise by the administrative agency of its continuing rule-making power."[568] Because Congress has left the Commission's general rulemaking powers intact, the ratification doctrine – even if properly invoked – would not bar us from exercising those powers to change the method used to define local radio markets and count radio stations for purposes of the local radio ownership rule.

(c) Geography-Based Radio Markets

273. We describe below the modified market definition and counting methodologies we will use to determine compliance with the local radio ownership rule.[569] We conclude that a local radio market that is objectively determined, *i.e.*, that is independent of the radio stations involved in a particular acquisition, presents the most rational basis for defining radio

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[566] *Implementation of Section 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, 11 FCC Rcd 12368, 12370 ¶ 4 (1996).

[567] *McCoy v. United States*, 802 F.2d 762, 766 (4th Cir. 1986).

[568] *Helvering v. Reynolds*, 313 U.S. 428, 432 (1941) (citing *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100-101 (1939)); *see also Brock*, 835 F.2d at 916.

[569] Applicants will be required to demonstrate compliance with the rule when filing applications to obtain a new construction permit or license, to assign or transfer an existing permit or license, or to make certain modifications, such as a change in the community of license of a radio station.

markets. We understand that geographic areas are less accurate than contours in measuring the signal reach of individual stations.[570] But radio stations serve people, not land; and while radio signals may overlap over uninhabited land or even water,[571] people in the United States tend to be clustered around specific population centers. The fact that radio signals are not congruent with geographic boundaries does not undermine the logic of relying on geographic areas to define radio markets.

274. As explained below, we will rely on the Arbitron Metro Survey Area (Arbitron Metro) as the presumptive market. We also establish a methodology for counting the number of radio stations that participate in a radio market.[572] We initiate below a new rulemaking proceeding to define radio markets for areas of the country not located in an Arbitron Metro, and we adopt a modified contour-overlap approach to ensure the orderly processing of radio station applications pending completion of that rulemaking proceeding.

(i) Arbitron Metro Survey Areas

275. *Market definition.* Where a commercially accepted and recognized definition of a radio market exists, it seems sensible to us to rely on that market definition for purposes of applying the local radio ownership rule. Arbitron, as the principal radio rating service in the country, has defined radio markets for most of the more populated urban areas of the country. These radio

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[570] *See, e.g.*, Entercom Comments in MM Docket No. 00-244 at 3; NAB Comments in MM Docket No. 00-244 at 11; Viacom Comments in MM Docket No. 00-244 at 3.

[571] *See, e.g.*, Main Street Comments in MM Docket No. 01-317 at 4-6.

[572] We make clear that any radio station that is included in the radio market (*i.e.*, the denominator) under our methodology will also be counted against a station owner's ownership limit in such market (*i.e.*, the numerator). We reject Viacom's argument that we should continue the numerator-denominator inconsistency in geography-based markets. *See* Letter from Anne Lucey, Viacom, to Paul Gallant, Special Advisor, Media Bureau (May 7, 2003) at 1 ("Viacom May 7, 2003 Ex Parte").

markets –Arbitron Metros – are Arbitron's primary survey area, which in turn are based on Metropolitan Areas (MAs) established by the Office of Management and Budget (OMB).[573]

276. The record shows that Arbitron's market definitions are an industry standard and represent a reasonable geographic market delineation within which radio stations compete.[574] Indeed, the DOJ consistently has treated Arbitron Metros as the relevant geographic market for antitrust purposes.[575] Although NAB opposes reliance on Arbitron markets, its own study states that Arbitron's service "is the primary currency through which buyers and sellers of radio airtime negotiate prices for radio advertising in most local markets."[576] As that study states, "all aspects of the information that Arbitron includes in

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[573] MOWG Study No. 11 at 4. MAs are comprised of metropolitan statistical areas (MSAs), consolidated metropolitan statistical areas (CMSAs), and primary metropolitan statistical areas (PMSAs). Metropolitan Areas 1999, Statistical Policy Office, Office of Management and Budget (OMB Metropolitan Areas). CMSAs are comprised of multiple PMSAs. In 2000, OMB revised its procedures for defining MAs. It also adopted a more generic term, Core Based Statistical Area (CBSA), to cover both traditional Metropolitan Areas and the new Micropolitan Statistical Areas ("Micro MSAs") that OMB has defined for less populated areas of the country. *See generally* Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82228 (2000). OMB released the updated MA and Micro MSA list, which incorporate the data from obtained the 2000 census, on June 6, 2003. *See* OMB Bulletin 03-04, http://www.whitehouse.gov/omb/bulletins/b03-04.html.

[574] NABOB Comments in MM Docket No. 01-317 at 8. *See also* Eure Comments in MM Docket No. 01-317 at 4; Inner City Comments at 3-4; North American Comments in MM Docket No. 01-317 at 4; UCC Comments in MM Docket No. 01-317 at 12; NABOB *et al.* Comments at 17.

[575] *See*, *supra* note 520.

[576] NAB Comments in MM Docket No. 00-244, Attachment B, *An Analysis of the Proposed Use of Arbitron Data to Define Radio Markets* by David Gunzerath, Ph.D., Director of Survey Research, Research & Planning Dep't, National Association of Broadcasters (Feb. 26, 2001) ("NAB Comments, Gunzerath Report").

these reports," including "the ways in which the markets are defined," are "driven by [the] single goal" of enabling "commercial radio stations and advertisers [to] determine the relative value of radio station airtime."[577] As NABOB succinctly states, "Radio stations compete in Arbitron markets."[578] Given the long-standing industry recognition of the value of Arbitron's service,[579] we believe there is strong reason to adopt a local radio market definition that is based on this established industry standard.[580]

277. Several commenters have argued that Arbitron market definitions are not reliable enough for us to use as a radio market definition.[581] Although Arbitron Metro boundaries do

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[577] NAB Comments in MM Docket No. 00-244, Gunzerath Report at 3.

[578] NABOB Comments at 18.

[579] Arbitron's predecessor was founded in 1966. NAB Comments in Docket No. 00-244, Gunzerath Report at 2.

[580] In approximately five areas, Arbitron Metros are embedded within or overlaps another Arbitron Metro. *Defining Moment in Radio* at 30. If the radio stations at issue in an application are located in such an embedded or overlap area, we will examine each Arbitron Metro separately and will not process the application unless the proposed combination complies with the local radio ownership rule in each Metro implicated by the proposed combination. We believe this approach comports with our general recognition that Arbitron's market definitions are the recognized industry standard. We reject Bear Stearns' proposal that we apply a different test for these markets in which permissible ownership levels would be based on the size and the business plan of the particular group owner. *Id.* at 31-32. We believe such a scheme would be inconsistent with our general reliance on Arbitron's market definition and cumbersome to administer.

[581] *See* NAB Comments in MM Docket No. 01-317 at 35; Cumulus Comments in MM Docket No. 01-317 at 24-25; Cumulus Reply Comments in MM Docket No. 01-317 at 4; WVRC Comments in MM Docket No. 00-244 at 24; Viacom Comments in MM Docket No. 00-244 at 7; NAB Comments in MM Docket No. 00-244 at 16-17; Entercom Comments in MM Docket No. 00-244 at 6; Cumulus Comments in MM Docket No. 00-244 at 5; Aurora Comments in MM Docket No. 00-244 at 8; ARD Reply Comments in MM Docket No. 00-244 at 1; Idaho Wireless Comments in MM Docket No. 00-244 at 6; Brill Comments in MM Docket No. 00-244 at

occasionally change, we are not convinced that such changes occur with such frequency, or that they are so drastic, that we must reject reliance on those boundaries in defining the relevant radio markets. Indeed, as Bear Stearns states, the "self-correcting" nature of Arbitron Metros can be a useful tool for keeping up with "the reality of the marketplace."[582]

278. We believe, moreover, that we can establish safeguards to deter parties from attempting to manipulate Arbitron market definitions for purposes of circumventing the local radio ownership rule. Specifically, we will not allow a party to receive the benefit of a change in Arbitron Metro boundaries unless that change has been in place for at least two years. This safeguard includes both enlarging the Metro (to make a market larger) and shrinking the Metro (to split a party's non-compliant station holdings into separate markets). Similarly, a station combination that does not comply with the rule cannot rely on a change in Arbitron Metro definitions to show compliance and thereby avoid the transfer restrictions outlined in the grandfathering section below, unless that change has been in effect for two years. We also will not allow a party to receive the benefit of the inclusion of a radio station as "home" to a Metro unless such station's community of license is located within the Metro or such station has been considered home to that Metro for at least two years.[583] We believe these

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2; Aurora Comments in MM Docket No. 00-244 at 10.

[582] *Defining Moment in Radio* at 11. Changes in Metro boundaries can occur as a result of population shifts. *Id.* In addition, Arbitron may add a county to a Metro if 55% of the county's radio listening is within the proposed Metro, 15% of the county's residents commute into the proposed Metro, and 75% of Arbitron subscribers agree to the proposed change. *Id.* We believe these standards will help protect against sudden, drastic changes in Arbitron Metro boundaries.

[583] Similarly, a party may not receive the benefit of changing the home status of its own station if such change occurred within the two years prior to the filing of an application. For an explanation of "home" status, see the following paragraphs regarding the counting methodology for Arbitron Metros.

safeguards will ensure that changes in Arbitron Metro boundaries and home market designations will be made to reflect actual market conditions and not to circumvent the local radio ownership rule.[584]

279. *Counting Methodology*. For each Arbitron Metro, Arbitron lists the commercial radio stations that obtain a minimum audience share in the Metro. Some of these stations are designated by Arbitron as "home" to the Metro. These "home" radio stations usually are either licensed to a community within the Arbitron Metro or are determined by Arbitron to compete with the radio stations located in the Metro. These radio stations are also known as "above-the-line" stations because, in ratings reports, Arbitron uses a dotted line to separate these stations from other radio stations – known as "below-the-line" stations – that have historically received a minimum listening share in a Metro.[585]

280. The Commission traditionally has relied on BIA's Media Access Pro database to obtain information about particular Arbitron Metros.[586] The BIA database relies on Arbitron's market definitions and builds upon Arbitron's data to provide greater detail about the competitive realities in Metro markets.[587] Given our experience with the BIA database

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[584] To the extent, of course, that we determine that, despite these safeguards, an Arbitron Metro boundary has been altered to circumvent the local radio ownership rule, we can and will consider that fact in evaluating whether a radio station combination complies with the rule's numerical limits.

[585] Stations that have no reportable audience share in a Metro may remain as a below-the-line station if they historically have received a minimum audience share in the Metro.

[586] See, *e.g.*, *Whitehall Enterprises, Inc.*, 17 FCC Rcd 17509 (2002). BIA is a communications and information technology, investment banking, consulting, and research firm. BIA provides strategic funding, consulting and financial services to the telecommunications, Internet, and media/entertainment industries.

[587] For example, Arbitron counts only commercial stations that meet certain

and its acceptance in the industry, we will count as being in an Arbitron Metro above-the-line radio stations (*i.e.*, stations that are listed as "home" to that Metro), as determined by BIA.[588] We also will include in the market any other licensed full power commercial or noncommercial radio station whose community of license is located within the Metro's geographic boundary.[589] By including these stations in the Metro, our counting methodology will reflect more accurately the competitive reality recognized by the radio broadcasting industry.[590] It is also quite sensible. Because we require radio stations to serve their communities of license, we know that stations licensed to communities in a particular Metro represent a source of competition within that Metro.[591] In addition to

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minimum reporting standards. *See* Letter from Anne Lucey, Viacom, to Paul Gallant, Special Advisor, Media Bureau (May 5, 2003), Attachment at 1 n.4. BIA attempts to include every commercial and noncommercial radio station licensed in each Metro. *Defining Moment in Radio* at 16. BIA also may determine on its own whether a particular station licensed to a community outside of a Metro should be listed as "home" to that Metro. *Id.*

[588] *See, e.g., id.* If the BIA database counts any foreign radio stations as participating in a particular Metro, we also will count those stations in the relevant market. *See id.* at 17; Jefferson-Pilot Comments in MM Docket No. 01-317 at 8-9.

[589] We will rely on the Commission's broadcast database in determining the communities of license of radio stations. In the rare case where the boundaries of a community of license cross a boundary between two radio markets, we will consider the radio stations licensed to that community to participate in both markets.

[590] By counting every radio station that is located in a Metro, we resolve concerns that Arbitron does not include stations that have less than a minimum audience share. *See* WVRC Comments in MM Docket No. 01-317 at 30 n.63, 31; Cumulus Comments in MM Docket No. 01-317 at 25; WVRC Comments in MM Docket No. 00-244 at 24; Cox Comments in MM Docket No. 00-244 at 10; Letter from Jack N. Goodman, NAB, to Michael K. Powell, Chairman, FCC (May 29, 2003) at 2 ("NAB May 29, 2003 Ex Parte").

[591] *See* UCC Comments in MM Docket No. 01-317 at 12-13. NAB claims that a community of license test produces a different market size count than a "home" market test. NAB May 29, 2003 Ex Parte at 2. However, NAB's

serving its community of license, to the extent that a radio station competes beyond that, it is likely to serve the larger outlying metropolitan areas that also comprise Arbitron Metros.[592] Accordingly, we find it is appropriate to count these radio stations in determining the size of an Arbitron Metro.[593]

281. We reject arguments that we should count below-the-line stations in determining the size of a Metro's radio market.[594] Below-the-line stations can be a considerable distance from the Metro, and in many cases serve different population centers, if not altogether different Metros, from

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own data suggest that the market tier would be the same under either test in over 60% of Metros. *Id.*; Attachment. Moreover, our counting methodology appears different from the one NAB used in its analysis. For example, NAB appears to have excluded stations from markets in which their communities of license are located if such stations are home to another Metro. As we explain in the following footnote, we always count a station as participating in the market in which its community of license is located.

[592] It is for this reason that a radio station located outside of a Metro occasionally may be included as home to that Metro. In such cases, we will count that station as participating in the radio market in which its community of license is located in addition to the Metro. We believe this simple rule will help prevent odd results in cases where a station requests "home" status in order to be viewed as a participant in another (usually larger) Metro. *See, e.g., Great Scott Broadcasting*, 17 FCC Rcd 5397, 5406 ¶ 25 (2002) (noting that a radio station that was licensed to Trenton, New Jersey and was the second highest rated station in the Trenton Metro was listed as home to the Middlesex-Somerset-Union Metro); *see also* Viacom May 7, 2003 Ex Parte at 3; NAB May 29, 2003 Ex Parte at 3.

[593] We disagree with commenters contend that contend that the "home" status designation is unreliable. *See, e g.*, Nassau Comments in MM Docket No. 01-317 at 8-9. Because a station will always be considered to participate in the radio market in which its city of license is located, the "home" status designation only affects radio stations licensed outside of the Metro to which it is home. It makes sense to us, moreover, to count those stations in the market in which they are commercially recognized as competitors.

[594] *See, e.g.*, Aurora Comments in MM Docket No. 00-244 at 12; Viacom May 7, 2003 Ex Parte.

radio stations located in the market.[595] NAB estimates that, on average, approximately 70% of radio listening within a market is "attributable to commercial stations listed as being home to that market."[596] Bear Stearns likewise estimates that local radio stations generally capture a disproportionate share of the local markets' listening share and revenue share.[597] Although we recognize that, in certain instances, certain below-the-line radio station may have a competitive impact in the market for radio listening, we believe that, on balance, counting every below-the-line radio station would produce a distorted picture of the state of competition in a particular Metro.[598]

(ii) Areas Not Located in an Arbitron Metro

282. Arbitron Metros do not cover the entire country; the 287 Arbitron Metros cover approximately 60% of the commercial radio stations, 30% of the counties, and 78% of the population

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[595] *See, e.g.*, UCC Comments in MM Docket No. 01-317 at 12-13.

[596] NAB Comments in MM Docket No. 01-317 at 4. We expect that listening to in-market stations is even higher when noncommercial stations are taken into account.

[597] *Defining Moment in Radio* at 12. Bear Stearns states that the mean of audience share and revenue share that the top 3 in-market radio station groups receive is 58.9% and 82.9%, respectively. Bear Stearns concludes that "'out-of-market' players are probably not as significant in competing for local dollars as are 'in-market' players." *Id.* Bear Stearns also notes that "the radio business, more than any other measured media, is a local medium" and that "78% of the radio industry's revenues are derived from local advertisers." *Id.* We have previously observed that local businesses may not find out-of-market radio stations to be adequate substitutes for in-market stations. *See, e.g., Youngstown Radio License, L.L.C.*, 17 FCC Rcd 13896, 13903 ¶ 20 (2002).

[598] This distortion generally can occur in two ways. First, counting every below-the-line station as numerically equal to every in-market station would artificially inflate the size of radio markets. Second, it could unnecessarily restrict consolidation *across* markets because a party's ownership interest in a radio station in one market could also count against that party in an adjacent market solely by virtue of such station obtaining a minimal audience share in the adjacent market. *See Defining Moment in Radio* at 13-14.

above the age of 12 in the United States, including Puerto Rico.[599] Several commenters have raised concerns concerning the appropriate method of defining radio markets in areas of the country not covered by Arbitron Metros.[600]

283. One possibility, in the absence of a pre-defined radio market, is to determine the relevant radio market on a case-by-case basis, in the context of an individual application. Such a process, however, would create significant regulatory uncertainty and impose substantial burdens on small-market radio broadcasters.[601] The better course is to develop radio market definitions for non-Metro areas through the rulemaking process.[602] We believe that would provide the most expeditious way to delineate appropriate radio market boundaries for the entire country and give all interested parties clear guidance about how we will analyze a proposed radio station combination under the local radio ownership rule. Because the rulemaking record in this proceeding provides little information about the appropriate boundaries of specific non-Metro radio markets,[603] we initiate below a new rulemaking proceeding to seek comment on that issue.

284. While that rulemaking proceeding is pending, we will need to process applications proposing radio station

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[599] MOWG Study No. 11 at 4-5 & nn. 6 & 7.

[600] *See, e.g.*, NAB Comments in MM Docket No. 01-317 at 35; WVRC Comments in MM Docket No. 01-317 at 29; Cumulus Reply Comments in MM Docket No. 01-317 at 5; WVRC Comments in MM Docket No. 00-244 at 23; Disney Comments in MM Docket No. 00-244 at 3; Viacom Comments in MM Docket No. 00-244 at 7; NextMedia Comments in MM Docket No. 00-244 at 4; NAB Comments in MM Docket No. 00-244 at 15; Entercom Comments in MM Docket No. 00-244 at 5; Cumulus Comments in MM Docket No. 00-244 at 6; Cox Comments in MM Docket No. 00-244 at 9; Brill Comments in MM Docket No. 00-244 at 2.

[601] *See, e.g.*, Letter from Lewis W. Dickey, President, Cumulus Media, to Michael K. Powell, Chairman, FCC (May 19, 2003) at 2.

[602] NAB May 23, 2003 Ex Parte at 2-3.

[603] *Id.*

combinations in non-Metro areas and determine whether such combinations comply with the local radio ownership rule. Although we find the contour-overlap methodology problematic for the reasons stated above, we conclude that its temporary use during the pendency of the rulemaking proceeding cannot be avoided. Conducting a case-by-case analysis would create significant regulatory uncertainty, and adopting an ill-considered "proxy" geographic market could produce unforeseeable distortions. The contour-overlap methodology is, at a minimum, well understood, and continuing its use for a few additional months would allow for the orderly processing of radio station applications.

285. Although we find it necessary to maintain the contour-overlap market definition for an additional period of time, we will make certain adjustments to minimize the more problematic aspects of that system. Specifically, we adopt NAB's proposal to exclude from the market (*i.e.*, the denominator) radio stations that are commonly owned with the stations in the numerator.[604] This will prevent a party from "piggy-backing" on its own stations to bump into a higher ownership tier. We also will adopt NAB's suggestion that we exclude from the market any radio station whose transmitter site is more than 92 kilometers (58 miles) from the perimeter of the mutual overlap area.[605] This will alleviate some of the gross distortions in market size that can occur when a large signal contour that is part of a proposed combination overlaps the contours of distant radio stations and thereby brings them into the market.

286. We will require parties proposing a radio station combination involving one or more stations whose communities of license are not located within an Arbitron Metro boundary to show compliance with the local radio

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[604] *Id.*

[605] *Id.*

ownership rule using the interim contour-overlap methodology.[606] In making that showing, parties should include in the numerator and denominator radio stations that meet the criteria for inclusion under that methodology (as modified by the preceding paragraph) regardless of whether they are included in Arbitron Metros. We emphasize, however, that the interim contour-overlap methodology may not be used to justify radio station combinations in Arbitron Metros that exceed the numerical limits of the local radio ownership rule; in all cases, parties must demonstrate – using the standards for Arbitron Metros described above – that they comply with those limits in each Metro implicated by the proposed combination.

(iii) Modification to The Local Radio Ownership Rule

(a) Analysis of the Current Numerical Limits

287. Having discussed the relevant product and geographic markets for radio, we now undertake our obligation under Section 202(h) to determine whether the current limits on radio station ownership are necessary to promote the public interest in competition.[607] With respect to the ownership tiers, we conclude that the current rule meets that standard. We find, however, that the rule improperly fails to consider the effect that noncommercial stations can have on competition in the local radio market. We accordingly modify the rule to count noncommercial radio stations in determining the size of the radio market.

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[606] The interim methodology will be triggered even if a radio station is "home" to an Arbitron Metro, as long as its community of license is located outside of the Metro.

[607] Although the numerical limits in the local radio ownership rule traditionally have been focused on ensuring "Local Radio Diversity," *see* 1996 Act, § 202(b), we rely primarily on our competition goal to justify the rule. *See Fox Television*, 280 F.3d at 1042.

288. We conclude that the ownership tiers in the current rule represent a reasonable means for promoting the public interest as it relates to competition. In radio markets, barriers to entry are high because virtually all available radio spectrum has been licensed. Radio broadcasting is thus a closed entry market, *i.e.*, new entry generally can occur only through the acquisition of spectrum inputs from existing radio broadcasters.[608] The closed entry nature of radio suggests that the extent of capacity that is available for new entry plays a significant role in determining whether market power can develop in radio broadcasting. Numerical limits on radio station ownership help to keep the available capacity from becoming "locked-up" in the hands of one or a few owners, and thus help prevent the formation of market power in local radio markets.

289. Although competition theory does not provide a hard-and-fast rule on the number of equally sized competitors that are necessary to ensure that the full benefits of competition are realized, both economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market.[609] The current tiers ensure that, in markets with between 27 and 51 radio stations, there will be approximately five or six radio station

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[608] The need for governmental approval also imposes costs on new entry into the market.

[609] A game-theoretic analysis of the number of independent firms that are required to produce competitive market performance is provided by R. Selter, *A Simple Model of Imperfect Competition Where Four are Few and Six are Many*, INT'L J. GAME THEORY 2 (1973). This model is presented more intuitively in Louis Phillips, COMPETITION POLICY: A GAME THEORY PERSPECTIVE Ch. 2 (Cambridge, UK: Cambridge Univ. Press 1995). An empirical study which finds that additional market entry has little effect on market conduct once a market has between three and five firms is provided by Timothy F. Bresnahan and Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. OF POL. ECON. 997-1009 (1991). These limits roughly comport with the limit in the DOJ/FTC Merger Guidelines between moderately- and highly-concentrated markets. *DOJ/FTC Guidelines* § 1.51.

firms of roughly equal size.[610] An analysis of the top 100 Metro markets indicates that many of them fall within this range.[611]

290. We find that the concentration levels permitted by the current rule represent a reasonable and necessary balance for radio broadcasting that comports with general competition theory, and we decline to relax the rule to permit greater consolidation in local radio markets. We acknowledge that many radio markets currently have more than 6 radio station firms. According to MOWG Study No. 11, the top 50 Metros have an average of 19.9 radio station owners, the next 50 Metros have an average of 11.4 owners, and the remaining Metros have an average of 6.7 owners.[612] We also consider, however, that radio stations are not all equal in terms of their technical capabilities (*i.e.*, each radio station covers a population with varying levels of signal quality), and that the technical differences among stations can cause radio stations groups with similar numbers of radio stations to have vastly different levels of market power. Thus, although the top 50 Metros have an average of 19.9 owners, the top station group in each of those Metros has, on average, 35.2% of the revenue share, and the top four groups receive, on average, 86.1% of the revenue share.[613] The top four firms also dominate audience share.[614] According to the Future of Music Coalition, the top

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[610] Markets with 27 radio stations must have at least 4.5 owners (27 stations divided by the 6 station limit). Markets with 51 radio stations must have at least 6.375 owners (51 stations divided by 8 station limit).

[611] *Defining Moment in Radio* at 21. Our own analysis of BIA data confirms this conclusion.

[612] MOWG Study No. 11, App. D.

[613] *Id.* In Metros 51 to 100, the average revenue shares for the top firm and the four top firms are 42.8% and 93.5%, respectively. In Metros 101-287, the figures are 50.9% and 95%, respectively.

[614] The radio stations that receive the highest audience shares tend to receive a disproportionate portion of the revenue shares. *See Defining Moment for Radio* at 12; *see also* Arbitron, Radio's Leading Indicator: Audience ratings

four firms receive 77.1% of the audience share in the top 10 Metros, 84.7% in Metros 11 to 25, and 85.8% in Metros 26-50.[615] Bear Stearns' analysis also shows that, in the top 100 radio markets, the top three radio groups receive a median of 82.9% of the revenue share and 58.9% of the audience share.[616] And MOWG Study No. 4 indicates that the increase in concentration in radio markets has resulted in an appreciable, albeit small, increase in advertising rates.[617] This data suggests that the current numerical limits are not unduly restrictive.[618]

291. For markets with more than 51 radio stations, the number of radio station firms ensured by the rule increases as the size of the market increases. Because of this, some parties argue that we should raise the numerical limits to permit common ownership of more than eight radio stations in larger markets.[619] We reject that argument. There is no evidence in the record that indicates that the efficiencies of consolidating radio stations increase appreciably for combinations involving more than eight radio stations.[620] On the other hand, extremely

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and the impact on revenue, available at http://www.arbitron.com/downloads/leadindicator2002.pdf.

[615] FMC Comments at 33. The audience share of the top four firms in markets 51-100 and 101-289 is 92.5% and 93.9%, respectively. *Id.*

[616] *Defining Moment in Radio* at 12.

[617] MOWG Study No. 4 at 18.

[618] We see no significant benefit in tinkering with the basic structure of the tiers. *See, e.g.*, Hodson Comments in MM Docket No. 01-317 at 7 (proposing six-tier framework). Bear Stearns argues that we should adjust the tiers because, in its view, Arbitron Metro markets contain on average fewer stations than the current contour-overlap markets. *Defining Moment in Radio* at 21-25. We reject that argument. The purpose of developing a sound market definition methodology is to enable us to measure concentration levels more accurately. We do not see why that should affect the level of concentration we permit in a (properly defined) market.

[619] *See Defining Moment in Radio* at 21-22; Viacom May 5, 2003 Ex Parte at 11.

[620] No party contends that radio broadcasting is a natural monopoly, *i.e.*, that

large radio markets tend to cover a large area geographically and also tend to be more "crowded" in terms of radio signals. As a result, large markets may include a greater number of extremely small radio stations, as well as radio stations that are a significant distance from each other.[621] Both of these phenomena may make a large market appear more competitive than it actually is.[622] For example, there are approximately 84 radio stations (52 FM and 27 AM) licensed to the Los Angeles Metro. Of the FM stations, twenty-three are Class A or Class D stations, the weakest classes of FM stations. Of the 27 AM stations in Los Angeles, only five are 50 kilowatts and three are 20 kilowatts. The remaining 19 AM stations include one 10 kilowatt station and 18 stations with a power of 5 kilowatts or less. Some of these technically weaker stations may, of course, be strong competitors in their markets, depending on a variety of factors such as format choice, population coverage, and quality of programming.[623] But even in Los Angeles, the second largest radio market in the nation, the top one, two, and

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one firm can always provide service more efficiently than two or more firms.

[621] *See, e.g.*, NextMedia Comments in MM Docket No. 00-244 at 5; *accord* Letter from Jeffrey H. Smulyan, Chairman and CEO, Emmis Communications to Michael K. Powell, Chairman, FCC (May 30, 2003); Letter from Lee J. Peltzman, Shainis and Peltzman, to Marlene H. Dortch, Secretary, FCC (May 7, 2003) (Peltzman May 7, 2003 Ex Parte Letter).

[622] In addition to our decision to cap radio station ownership at 8 stations, we take the technical differences of radio stations into account by maintaining separate AM and FM limits.

[623] It is for this reason that we cannot agree with certain commenters' arguments that we should allow greater consolidation of less powerful radio facilities in a local market. *See, e.g.*, Letter from John S. Logan, Dow, Lohnes & Albertson, to Marlene H. Dortch, Secretary, FCC (May 15, 2003); Letter from Linda G. Morrison, Leventhal, Senter & Lerman, to Marlene H. Dortch, Secretary, FCC (May 28, 2003); NextMedia Comments in MM Docket No. 00-244 at 4-5. The local radio ownership rule takes into account differences in power and class of radio stations where appropriate. We see no feasible way to account for unique market conditions or individual company holdings without frustrating our goal of providing regulatory certainty through relatively simple, bright-line rules.

four radio station firms receive 31.2%, 60.2%, and 76.1%, respectively, of the revenue share.[624] By capping the numerical limit at eight stations, we seek to guard against consolidation of the strongest stations in a market in the hands of too few owners and to ensure a market structure that fosters opportunities for new entry into radio broadcasting.[625]

292. We also decline to make the numerical limits more restrictive. In the smallest radio markets, the current rule provides that one entity may own up to half of the commercial radio stations in a market. Although this would be considered highly concentrated from a competitive point of view, the Commission has recognized that greater levels of concentration may be needed to ensure the potential for viability of radio stations in smaller markets.[626] Given these concerns, we find it reasonable to allow greater levels of concentration in smaller radio markets, but to require more independent radio station owners as the size of the market increases and viability concerns become less acute.

293. In analyzing the level of concentration in radio markets that would be consistent with the public interest, we seek both to ensure a healthy, competitive radio market and enable radio owners to achieve significant efficiencies through consolidation of broadcast facilities. Prior to 1992, the local radio ownership rule did a poor job of recognizing that a certain level of consolidation can be efficient. Given the generally difficult economic conditions at the time, the inability of stations to seek efficiencies through consolidation may have contributed to the industry's financial difficulties. We do not seek to undermine the benefits that consolidation has brought to the financial stability of the radio industry; we seek to ensure that such

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[624] MOWG Study No. 11, App. F.

[625] *See infra* ¶¶ 296-301.

[626] *See 1992 Radio Ownership Order*, 7 FCC Rcd at 2777 (competitive realities are substantially different in markets of different sizes). *See also* Cumulus Comments in MM Docket No. 01-317 at 18-20.

consolidation does not reach the point of stifling competitive incentives. Because we believe that the current numerical limits by and large strike the appropriate balance,[627] we reaffirm those limits.

294. We also reaffirm the AM and FM ownership limits in the current rule. Eliminating the service limits would improperly ignore the significant technical and marketplace differences between AM and FM stations. AM stations have significantly less bandwidth than FM stations, and the fidelity of their audio signal is inferior to that of FM stations.[628] Unlike FM stations, moreover, AM signal propagation also varies with time of day. During the day, AM signals travel through ground currents for between 50 to 200 miles; at night, AM signals travel further because they are reflected from the upper atmosphere. As a result, "many AM stations are required to cease operation at sunset."[629] These and other technical differences[630] have an effect on radio listenership patterns. As of 2002, 82% of radio audience comes from the FM service,

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[627] *See Sinclair*, 284 F.3d at 162; *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000) (the Commission "has wide discretion to determine where to draw administrative lines"); *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (the Commission's line-drawing is entitled deference so long as it is not "patently unreasonable"); *Health and Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1043 (D.C. Cir. 1987) ("the scope of review is particularly limited when the FCC engages in 'the process of drawing lines'"); *Hercules Inc. v. EPA*, 598 F.2d 91, 107-108 (D.C. Cir. 1978) (agency's numbers must only be within a "zone of reasonableness").

[628] *See Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, 17 FCC Rcd 19990, 19997 ¶ 19 (2002). The development of in-band, on-channel technology may help AM stations overcome this limitation. *See id.*

[629] *Id.*

[630] *See generally Review of Technical Assignment Criteria for the AM Broadcast Service*, 2 FCC Rcd 5014 (1987); *Review of Technical Assignment Criteria for the AM Broadcast Service*, 5 FCC Rcd 4381 (1990); *Review of the Methods for Calculating Nighttime Protection for Stations in the AM Broadcast Service*, 3 FCC Rcd 6448 (1988).

while 18% of radio audience comes from the AM service.[631] Radio formats also can be affected. In Los Angeles, for example, our analysis indicates that many of the AM stations have a news/talk/sports or ethnic format, while music formats are more likely on commercial FM stations. We cannot agree, therefore, that eliminating the service caps and treating AM and FM radio stations equally for purposes of the overall station limit is consistent with our interest in protecting competition in local radio markets.

295. Although we reaffirm the ownership tiers in the local radio ownership rule, we conclude that it is not necessary in the public interest to exclude noncommercial radio stations in determining the size of the radio market. Although noncommercial stations do not compete in the radio advertising market, they compete with other radio stations in the radio listening and program production markets.[632] Indeed, noncommercial stations can receive a significant listening share in their respective markets.[633] Their presence in the market therefore exerts competitive pressure on all other radio stations in the market seeking to attract the attention of the same body of potential listeners. In television, we have recognized the contribution that noncommercial stations can make to competition by counting noncommercial stations in determining

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631 *See* Arbitron National Radio Services, Tracking Trends at http://www.Arbitron.com/national_radio/home.htm (visited May 11, 2003); *see also* Peltzman May 7, 2003 Ex Parte at 1. Viacom argues that "four of the ten highest billing stations in the country are AM stations." *See* Letter from Meredith Senter, Levanthal, Senter & Lerman, to Marlene H. Dortch, Secretary, FCC (May 15, 2003) at 3. We fail to see how looking at only the top ten billing stations provides much information about the relative strength of AM and FM stations across the country. To the contrary, the fact that a few high-power AM stations are comparable to FM stations in terms of billing capability weighs against Viacom's alternative argument that we should disregard AM ownership entirely. *Id.*

632 *See, e.g.*, Viacom May 5, 2003 Ex Parte at 4.

633 *See, e.g.*, Viacom May 7, 2003 Ex Parte at 2.

the size of the television market. We see no reason to treat noncommercial radio stations differently.

(b) Rejection of Repeal and Other Modifications

296. We reject arguments that we should repeal the local radio ownership rule. We see nothing in the record that persuades us that the acquisition of market power in radio broadcasting serves the public interest.[634] As we explain in the Policy Goals section, we are committed to establishing a regulatory framework that promotes competition in the field of broadcasting. Competition breeds innovation in programming and creates incentives to continually improve program quality.[635] Because competition – and the benefits that flow from it – is lessened when the market is dominated by one or a few players, we seek through our rules to prevent that type of market structure from developing.

297. Without some check, a party could acquire all or a significant portion of the limited number of broadcast radio channels in a local community, leaving listeners, advertisers, and program producers with fewer substitutes. That situation also would raise the cost of entry into the market by new entrants because there would be fewer radio stations available from which a party could construct a competing station group.[636] Because the most potent sources of innovation often

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[634] Most of the debate centers around whether radio broadcasting constitutes a separate relevant product market (we have concluded that it does) and the means we should use to protect competition in the relevant market (we have just answered that question). Although some parties have suggested that monopoly in broadcasting would promote program diversity, we find the evidence supporting that theory inconclusive. *See infra* ¶¶ 307-315.

[635] *See, e.g., EchoStar/DirecTV HDO*, 17 FCC Rcd at 20626 ¶ 176. *See also* Policy Goals, Section III, *supra*.

[636] *See* Dick Comments in MM Docket No. 01-317 at 6; Hodson Comments in MM Docket No. 01-317 at 6.

arise from new entrants,[637] a market structure that significantly raises the costs of entry leads to less-than-optimal results in terms of innovation and program quality and thereby harms the public interest.[638] It is therefore necessary for us to impose limits on the number of radio stations a party may own in a local market to preserve competition in the relevant markets in which radio stations compete.[639]

298. Several commenters argue that the local radio ownership rule is unjustified because consolidation has resulted in efficiencies and has produced significant public interest benefits.[640] In the *Local Radio Ownership NPRM*, we asked for information on three specific markets – Syracuse, New York; Rockford, Illinois; and Florence, South Carolina. Clear Channel is the largest group owner in Syracuse;[641] Cumulus is a large group owner in Rockford and Florence.[642] Clear Channel and Cumulus have provided detailed information highlighting the public interest benefits that they contend they have produced by consolidating radio stations in those markets, such as greater investment in facilities and programming, including local news and public affairs.[643]

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[637] *See, e.g., 1998 Biennial Regulatory Review – Testing New Technology*, 14 FCC Rcd at 6077 ¶ 28; *see also* MMTC Comments in MM Docket No. 01-317 at 107.

[638] *See* Policy Goals, Section III, *supra*.

[639] *Id.* Contains explanation of why we decide to rely on prescriptive rules rather than case-by-case analyses to promote our public interest objectives in media.

[640] *See, e.g.*, Viacom Comments in MM Docket No. 01-317 at 51, 60-63; Clear Channel Comments in MM Docket No. 01-317 at 23-24.

[641] Clear Channel Comments in MM Docket No. 01-317 at 24.

[642] Cumulus Comments in MM Docket No. 01-317 at 7.

[643] Clear Channel Comments in MM Docket No. 01-317, Exh. 4; Cumulus Comments in MM Docket No. 01-317 at 6-14; Cumulus Comments at 7-12. Clear Channel also filed similar information about other radio markets in which it operates. Clear Channel Comments in MM Docket No. 01-317,

299. We do not dispute that a certain level of consolidation of radio stations can improve the ability of a group owner to make investments that benefit the public.[644] Our responsibility under the statute, however, is to determine the level at which the harms of consolidation outweigh its benefits, and to establish rules to prevent that situation from developing. And while Clear Channel, Cumulus, and others highlight the public interest benefits that they were able to achieve through consolidation, we also seek to ensure that radio stations outside of the dominant groups can remain viable and, beyond that, can prosper. Several commenters express concern that, in markets with a high level of concentration, small radio firms may be forced to "sell out" to group owners.[645] Specifically, the concern is that, in a concentrated market, dominant radio station groups can exercise market power to attract revenue at the expense of the small owner.[646] As a result, the small owner has greater difficulty obtaining the revenue it needs to develop and broadcast attractive programming and to compete generally against the dominant station groups.[647] Although we decline to

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Exh. 5.

[644] *See, e.g.*, NAB Comments in MM Docket No. 01-317 at 44-45; Radio One Comments in MM Docket No. 01-317 at 11-12; Viacom Comments in MM Docket No. 01-317 at 60-62; Clear Channel Comments in MM Docket No. 01-317 at 23-24; Cumulus Comments in MM Docket No. 01-317 at 5-6, 19; Zimmer Comments in MM Docket No. 00-244 at 6; Weigle Comments in MM Docket No. 00-244 at 6; Viacom Comments in MM Docket No. 00-244 at 6; HBC Comments in MM Docket No. 01-317 at 11-12; NAB Reply Comments in MM Docket No. 01-317 at 11; Zimmer Comments in MM Docket No. 00-244 at 7.

[645] *See* AFTRA Comments in MM Docket No. 01-317 at 2; North American Comments in MM Docket No. 01-317 at 12; Blakeney Comments in MM Docket No. 01-317 at 2; MMTC Comments in MM Docket No. 01-317 at 23-24, 45.

[646] *See* North American Comments in MM Docket No. 01-317 at 11; Idaho Comments in MM Docket No. 01-317 at 3; Dick Comments in MM Docket No. 01-317 at 3; MMTC Comments in MM Docket No. 01-317 at 21.

[647] *See* AFTRA Comments in MM Docket No. 01-317 at 9; Daugherty

pass on the competitive situation in any particular radio market in the context of this rulemaking proceeding,[648] the concerns raised by these commenters comport with the competition analysis that underlies this order and supports our decision not to repeal the local radio ownership rule.

300. We also reject arguments that we incorporate a market share analysis into the local radio ownership rule or that we continue to "flag" applications that propose radio station combinations above a certain market share.[649] Several parties have suggested that we consider audience share or revenue share in determining the level at which common ownership of local radio stations becomes contrary the public interest.[650] We recognize that competition analysis generally looks to market share as the primary indicator of market power. Market share, however, must be considered in conjunction with the overall structure of the industry in determining whether market power

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Comments in MM Docket No. 01-317 at 3; Kennelwood Comments at 1-3.

[648] *See, e.g.*, Kennelwood Comments at 8.

[649] In August 1998 the Commission began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concern for maintaining diversity and competition. *See* Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998). Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in that market. *See Applications of Shareholders of AMFM, Inc., (Transferor) and Clear Channel Communication, Inc. (Transferee)*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000) ("*AMFM, Inc.*"). Flagged transactions were subject to a further competitive analysis, the scope of which is embodied in the interim policy set forth in the *Local Radio Ownership NPRM*, 16 FCC Rcd at 19894-97 ¶¶ 84-89.

[650] *See, e.g.*, Hodson Comments in MM Docket No. 01-317 at 6-7; UCC Comments in MM Docket No. 01-317 at 27; NABOB Comments in MM Docket No. 01-317 at 5; Radio One Reply Comments in MM Docket No. 01-317 at 3; Cumulus Comments at 14.

is present.[651] In radio, the availability of a sufficient number of radio channels is of particular importance in ensuring that competition can flourish in local radio markets. The numerical caps and the AM/FM service limits are designed to address that interest, and in our judgment, establishing a inflexible market share limit in our bright-line rule would add little, if any, benefit. We do not seek to discourage radio firms from earning market share through investment in quality programming that listeners prefer; our objective is to prevent firms from gaining market dominance through the consolidation of a significant number of key broadcast facilities. We do not believe that developing a market share limit would significantly advance that objective.

301. We recognize that our conclusion differs from the Commission's view in 1992 that an audience share cap was necessary "to prevent consolidation of the top stations in a particular local market."[652] But the audience share cap was never intended to be more than a "backstop" to the new numerical limits the Commission had established, which for the first time allowed a party to own multiple radio stations in a local market.[653] The audience share cap was eliminated as a result of the revisions to the local radio ownership rule that Congress mandated in the 1996 Act, which left only the numerical caps in place. But because of the problems associated with the contour-overlap market definition and counting methodologies, we could not rely with confidence on those numerical limits to protect against undue concentration in local markets. As a result, we began looking at revenue share in our "flagging" process and the interim policy that we established in the *Local Radio Ownership NPRM*. Now that we have established a rational system for defining radio markets

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[651] *See, e.g., United States v. Microsoft Corp.*, 235 F.3d 34, 51, 54 (D.C. Cir. 2001); *TV FNPRM*, 10 FCC Rcd at 3535 ¶ 21.

[652] *1992 Radio Ownership Order*, 7 FCC Rcd at 2781 ¶ 53.

[653] *Id.*

and counting market participants, we believe that the numerical limits will be better able to protect against harmful concentration levels in local radio markets that might otherwise threaten the public interest. To the extent an interested party believes this not to be the case, it has a statutory right to file a petition to deny a specific radio station application and present evidence that makes the necessary *prima facie* showing that a proposed combination is contrary to the public interest.[654]

b. Localism

302. Our localism goal stems from our interest in ensuring that licensed broadcast facilities serve and are responsive to the needs and interests of the communities to which they are licensed.[655] Our localism policy influences many of our broadcast policy decisions, including decisions relating to how radio spectrum is allocated and to the public interest obligations that are imposed on radio broadcasters.[656]

303. Some commenters argue that the local radio ownership rule harms localism by preventing efficient consolidation that promotes improved local service. As explained in the Competition Section above, we agree that consolidation of radio stations can result in efficiencies. This does not mean, however, that all consolidation serves the public interest.[657] We recognize only those efficiencies that inure to the benefit of the public.[658] In a competitive market, the efficiencies arising out of consolidation will be passed on to listeners through greater innovation and improved service quality, which in this context contemplates programming that is responsive to the needs and interests of the local community. In a concentrated market,

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[654] 47 U.S.C. § 309(d).

[655] *Notice*, 17 FCC Rcd at 18526 ¶ 70.

[656] *Id.*

[657] *See 2000 CMRS Review*, 16 FCC Rcd at 22696 ¶ 55.

[658] *See, e.g., Whitehall Enterprises, Inc.*, 17 FCC Rcd at 17525 ¶ 49. *Accord EchoStar/DirecTV HDO*, 17 FCC Rcd at 20604 ¶ 98.

radio station firms have diminished incentive to compete vigorously. Smaller firms, moreover, may have insufficient resources to compete aggressively with the dominant firms in the market, which makes smaller firms less effective in meeting the needs and interests of their local communities. Thus, by preserving a healthy, competitive local radio market, the local radio ownership rule also helps promote our interest in localism.

304. Aside from the positive effect on localism that ensues from a competitive radio market, we see little to indicate that the local radio ownership rule significantly advances our interest in localism. In prior rulemaking proceedings, the Commission has not emphasized localism as one of the justifications for the local radio ownership rule,[659] and the record suggests no reason for adopting a different view here. Although some parties suggest that localism has suffered as a result of consolidation, the source of the alleged harm appears to be the overall *national* size of the radio station group owner rather than the number of radio stations commonly owned in a local market. Thus, Idaho Wireless contends that large group owners downsize local staff so that "they can run stations all over the country more cheaply,"[660] and UCC asserts that consolidation has resulted in "nearly identical programming" in *different* local markets.[661] These concerns do not address whether consolidation of radio stations in a *local* market would harm localism. National radio ownership limits are outside the scope of this proceeding.

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[659] *See, e.g., 1992 Radio Ownership Order*, 7 FCC Rcd 2755; *1989 Multiple Ownership First Report and Order*, 4 FCC Rcd 1723.

[660] Idaho Wireless Comments in MM Docket No. 01-317 at 3, 9-10; *see also* North American Comments in MM Docket No. 01-317 at 11.

[661] UCC Reply Comments in MM Docket No. 01-317 at 17.

c. Diversity

305. *Viewpoint Diversity.* Viewpoint diversity "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[662] Many outlets contribute to the dissemination of diverse viewpoints, and provide news and public affairs programming to the public. Elsewhere in this *Order*, we discuss in exacting detail the various sources of local news and information that are available to the public. Here, it is sufficient to say that media other than radio play an important role in the dissemination of local news and public affairs information.

306. That, of course, does not mean that radio broadcasting is irrelevant to viewpoint diversity. We recognize that radio can reach specific demographic groups more easily than other forms of mass media.[663] Because of this, and because of its relative affordability compared to other mass media, radio remains a likely avenue for new entry into the media business, particularly by small businesses, women, minorities, and other entrepreneurs seeking to meet a market demand or provide programming to underserved communities. New entry promotes outlet diversity, which in turn enhances viewpoint diversity and the public interest. Our competition-based limits on local radio ownership thus promote viewpoint diversity, not only by ensuring a sufficient number of independent radio voices, but also by preserving a market structure that facilitates and encourages entry into the local media market by new and underrepresented parties.

307. *Programming Diversity.* Some commenters argue that program diversity should be the paramount diversity concern in radio broadcasting.[664] The record is divided on the effect of

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[662] *Associated Press v. United States*, 326 U.S. 1 (1945).

[663] *See* MMTC Comments in MM Docket No. 01-317 at 47.

[664] *See, e.g.*, NAB Comments in MM Docket No. 01-317 at 16; Clear

consolidation on program diversity. Some argue that the local radio ownership rule harms program diversity because greater concentration leads to more homogenized, less innovative programming.[665] Others argue that the rule encourages program diversity because greater concentration encourages the common owner to program in a manner that appeals to different audiences.[666]

308. In theory, program diversity promotes the public interest by affording consumers access to a greater array of programming choices. We have long recognized that the most extreme example of zero program diversity – duplication of programming – generally results in an inefficient use of the scarce radio spectrum and a lost opportunity to use that spectrum to serve a community. For that reason, our rules restrict the ability of radio broadcasters to duplicate programming in the same community.[667] The corollary is that greater variety of differentiated programming advances the public interest by giving consumers in a local community more selection from which they can obtain programming to meet their varied interests.

309. No party seriously disputes that greater program diversity promotes the public interest. The difficulty is in finding a way to measure program diversity in a coherent and consistent manner so that we can determine how it is affected by concentration.[668] The record indicates that different

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Channel Comments in MM Docket No. 01-317 at 14.

[665] AFTRA Comments in MM Docket No. 01-317 at 11; Hodson Feb. 28, 2002, Comments at 5-6; Amherst Comments in MM Docket No. 01-317 at 3.

[666] NAB Comments in MM Docket No. 01-317 at 18-20; Radio South Comments in MM Docket No. 01-317 at 2; Clear Channel Reply Comments in MM Docket No. 01-317 at 3; NAB Reply Comments in MM Docket No. 01-317 at 12; Zimmer Comments In MM Docket No. 00-244 at 6; Citadel Comments in MM Docket No. 00-244 at 8.

[667] 47 C.F.R. § 73.3556.

[668] The relationship between concentration and program diversity is not

measures of format diversity produce strikingly different results.

310. A number of commenters cite a recent study by Berry and Waldfogel that found that reductions in the numbers of owners in radio markets led to an increase in radio format labels.[669] This confirms, they argue, Steiner's claim that a monopoly broadcaster will provide more diverse programming than a number of competitive stations.[670] The evidence presented in MOWG Study No. 11, however, suggests that the number of formats across radio markets has remained flat since the passage of the 1996 Act.[671] The discrepancy between these two studies is due to the different classification of format used in each study. MOWG Study No. 11 uses the most general type of classification available in the BIA database, while Berry and Waldfogel uses the finer classification formats available in Duncan. An example will illustrate the difference. One radio format Adult Contemporary taken from the BIA can be broken down into five different subformats under Duncan's system: Adult Contemporary, Adult Contemporary/Album Oriented Rock, Adult Contemporary/Contemporary Hit Radio, Adult Contemporary/ New Rock, and Adult Contemporary Oldies. While we agree that the Duncan formats allow a somewhat richer portrayal of the variety of music than the more general format categories, we are not certain how substantial the difference between many of these minor subcategories within

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necessarily linear. One study examining the relationship between industry structure and variety in the music recording industry found that high and low levels of concentration result in less variety, while maximum variety is promoted at a moderately concentrated structure. In this study, that moderate concentration level corresponded with the top four firms capturing approximately half the market revenue. *See* Peter J. Alexander, Product Variety and Market Structure, 32 J. ECON. BEHAVIOR & ORG. 207 (1997).

669 Steven Berry and Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116(3) Q. J. ECON. 1009-25.

670 Steiner, *supra* note 403. *See infra* ¶¶ 313-14.

671 MOWG Study No. 11.

the major categories of format are. We therefore question how well the increases in radio formats reported by Berry and Waldfogel imply increases in radio program diversity.

311. The relationship between radio formats and radio programming is investigated in a study by Peter DiCola and Kristin Thomson.[672] By searching through playlist data in *Radio and Records*, they found substantial overlap between the major radio formats. For example, they found that in August 2002, that Contemporary Hit Rock (CHR) Rhythmic and Urban shared 76% of the songs on their top 50 charts.[673] Further, they found that the overlap had increased for some music format pairs and decreased for others.[674] The considerable overlap between major format categories reported by DiCola and Thomson suggest far greater overlap between the Duncan formats which Berry and Waldfogel use. The presence of substantial overlap between music formats that do not remain stable through time suggests that the number of formats is not a good measure of program diversity.

312. MOWG Study No. 9 addresses the issue of diversity in radio by examining top 10 playlists across a sample of radio stations published by *Radio and Records*.[675] Overall, the results suggest that song diversity remained approximately flat from 1996 to 2001. MOWG Study No. 9 compared the total number of unique songs in top 10 playlists between 1996 and 2001 and found the number of songs changed from 1241 to 1228, a 1 percent decline.[676] MOWG Study No. 9 also

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[672] Future of Music Coalition Comments, *Radio Deregulation: Has It Served Citizens and Musicians?* by Peter DiCola and Kristin Thomson.

[673] Future of Music Coalition Comments at Table 4-1, at 56.

[674] For example, overlap in Top 50 charts for CHR Pop and CHR Rhythmic has increased by 14% from 1994 and 2002. *Id* at Table 4-2, at 60.

[675] MOWG Study No. 9, Radio Market Structure and Music Diversity by George Williams, Keith Brown, and Peter Alexander (Sept. 2002) ("MOWG Study No. 9").

[676] *Id.* at 9.

constructed a measure to compare the difference of the top 10 songs played between radio stations.[677] The authors found that comparing stations within the same format led to an overall decline of 2.4% in top 10 playlist diversity.[678] A similar exercise, however, comparing radio stations in similar but different formats found a slight increase in diversity of 0.74%.[679] The study also attempted to establish the direct link of songlist diversity and consolidation in the radio industry. Overall, the results suggest that consolidation in the radio industry neither helped nor hindered playlist diversity between radio stations.[680]

313. The studies on program diversity also do not draw a sufficiently reliable causal link between ownership concentration and the purported increase in format diversity. To establish that link, some commenters rely on the theory proposed by Peter Steiner in 1952 that a monopoly broadcaster will diversify programming to attract different groups with distinct listening preferences and thereby secure the largest total audience for advertisers, whereas broadcasters operating in a competitive environment would be more likely to duplicate formats if a majority of listeners prefer a particular format.

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[677] The technical details of this difference measure are described in the paper, but essentially the measure counts the number of times two different playlists do not share a song. Thus if the top 10 songs of two stations share 4 songs, the distance measure would equal 6.

[678] MOWG Study No. 9 at 11.

[679] *Id.* at 13.

[680] MOWG Study No. 9 also attempted to establish the direct relationship between consolidation of radio stations in a market and the songlist diversity in that market through linear regression. The results reported suggest that common ownership of radio stations in a market can increase playlist diversity. Unfortunately, inspection of the data suggest that this result may not be very robust. The number of common radio stations in issues of *Radio and Records* examined between 1996 and 2001 is so few that that the result is driven by only a handful of radio station pairs. This remains to be an important question for further research.

According to these commenters, the Steiner theory supports the causal link between the increase in radio ownership concentration over the last few years and the asserted increase in format diversity.[681]

314. Steiner's theory has produced much discussion and research in the economic literature,[682] and the Commission has itself recognized the theory that greater consolidation could lead to greater format diversity.[683] After a careful review of the economic literature, however, we cannot confidently adopt the view that we should encourage more consolidation in order to achieve greater format diversity. Like many economic theories, the Steiner theory and its progeny rests on a number of assumptions. The ability of the theory to predict actual market results reliably therefore depends in large part on the accuracy of those assumptions. For example, Steiner assumes that viewers prefer only one type of programming; when viewers have lesser preferred substitutes, different results are produced. Moreover, competitive models perform better than monopoly in terms of diversity and consumer welfare when channel space increases.[684] Changes in various other assumptions also may affect the results reached by the original Steiner model.[685] We need not review all of these assumptions here; it is sufficient that they exist and that their accuracy is open to debate. Although further research on the Steiner model may be fruitful,

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[681] *See, e.g.*, Clear Channel Comments, Hausman Statement at 12.

[682] Jack H. Beebe, in particular, has used the Steiner model to create a significantly more sophisticated model of program choice in broadcasting. Jack H. Beebe, *Institutional Structure and Program Choices in Television Markets*, 91(1) Q. J. ECON. 15 (1977).

[683] *Notice*, 17 FCC Rcd at 18530 ¶ 82 n.159.

[684] Beebe, *supra* note 685 at 15.

[685] For example, taking advertising into account may change the results of the Steiner model. *See* Simon Anderson and Steve Coate, *Market Provision of Public Goods: The Case for Broadcasting*, Working Paper (UVA and Cornell 2001).

we cannot at this time rely on that model to accept the argument that greater consolidation leads to more format diversity in radio broadcasting.[686]

315. In light of this record, we cannot conclude that radio ownership concentration has any effect on format diversity, either harmful or beneficial. Accordingly, we do not rely on it to justify the local radio ownership rule.[687]

2. Attribution of Joint Sales Agreements

316. In the *Local Radio Ownership NPRM*, we sought comment on the appropriate regulatory treatment for radio Joint Sales Agreements (JSAs).[688] A typical radio JSA authorizes the broker to sell advertising time for the brokered station in return for a fee paid to the licensee. Because the broker normally assumes much of the market risk with respect to the station it brokers, JSAs generally give the broker authority to

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[686] Even if the Steiner model is an accurate model of program choice in broadcasting, we would not necessarily conclude that greater consolidation in radio broadcasting would serve the public interest. As explained above, consolidation may have certain negative effects on innovation and program quality that outweigh any asserted increase in program diversity. Because we do not rely on the Steiner model here, we do not attempt to undertake a balancing of those competing interests at this time.

[687] We leave open the possibility that, after further research, additional evidence may be adduced to establish the link between ownership concentration and format diversity. If such a link can be shown, we will consider the implications of that link on the local radio ownership rule at that time.

[688] As we stated in the *Notice*, as a general matter, we are not reviewing our attribution rules as part of the biennial review process. *Notice*, 17 FCC Rcd at 18506 ¶ 7 n.13. However, we specifically sought comment in the *Local Radio Ownership NPRM* on whether to attribute radio JSAs. Therefore, we will consider changes to our attribution rules only in this one context. Because we did not raise the issue of whether to change our current policy regarding non-attribution of television JSAs, we will not consider any changes in this *Order*. We will issue a future Notice of Proposed Rulemaking to seek comment on whether or not to attribute television JSAs.

hire a sales force for the brokered station, set advertising prices, and make other decisions regarding the sale of advertising time, subject to the licensee's preemptive right to reject the advertising. Currently, JSAs are not attributable under the Commission's attribution rules. Therefore, radio stations subject to JSAs do not count toward the number of stations the brokering licensee may own in a local market.

317. Based on the record in this proceeding, and on our experience with JSAs and our local radio ownership rules, we will now count the brokered station toward the brokering licensee's permissible ownership totals under the revised local ownership rules. Where an entity owns or has an attributable interest in one or more stations in a local radio market, joint advertising sales of another station in that market for more than 15 percent of the brokered station's advertising time per week will result in counting the brokered station toward the brokering licensee's ownership caps. Specifically, we have concerns regarding the impact of in-market JSAs on competition in local radio markets. We do not believe that out-of-market JSAs pose the same economic concerns. Therefore, JSAs will not be attributable when a party does not own any stations or have an attributable interest in stations in the local market in which the brokered station is located.[689]

318. In considering revisions to our attribution rules, we have always sought to identify and include those positional and ownership interests that convey a degree of influence or control to their holder sufficient to warrant limitation under our

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[689] For instance, consider a licensee that owns a radio station in the Cleveland, Ohio, radio metro, and has a JSA for a radio station in the Akron, Ohio, radio metro. The broker owns no stations in the Akron, Ohio, market. The JSA in the Akron, Ohio, market therefore would not be attributable. However, in-market JSAs will be attributable regardless of whether the advertising time for the station is sold in conjunction with commonly owned stations in the same market, or with stations in distant markets. The potential for influence over the brokered station would exist under both scenarios.

ownership rules.[690] As with LMAs, JSAs are not precluded by any Commission rule or policy as long as the Commission's ownership rules are not violated and the participating licensees maintain ultimate control over their facilities. Nothing in the record indicates that licensees abdicate control over stations that are subject to JSAs. However, we find that the use of in-market JSAs may undermine our continuing interest in broadcast competition sufficiently to warrant limitation under the multiple ownership rules.[691] Where we have referred to *influence*, we have viewed it as an interest that is less than controlling, but through which the holder is likely to induce a licensee to take actions to protect the interests of the holder. Our judgment as to what level of influence should be subject to restriction by the multiple ownership rules has, in turn, been based on our judgment regarding what interests in a licensee convey a realistic potential to affect its programming and other core operational decisions.[692]

319. We find that where one station owner controls a large percentage of the advertising time in a particular market, it has the ability potentially to exercise market power. Many times, the broker will sell advertising packages for the group of stations, offer substantial discounts and create incentives not available to other broadcasters in the market. In any given radio market, a broker may own or have an ownership interest in stations, operate stations pursuant to an LMA,[693] or sell

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[690] *Attribution of Ownership Interests*, 97 F.C.C.2d 997, 999, 1005 (1984), ("*1984 Attribution Order*") *on recon.*, 58 RR 2d 604 (1985), *on further recon.*, 1 FCC Rcd 802 (1986); *1999 Attribution Report and Order*, 14 FCC Rcd at 12612 ¶ 121.

[691] *See 1992 Radio Ownership Order*, 7 FCC Rcd at 2788 ¶ 64; *Attribution NPRM*, 10 FCC Rcd 3606, 3609 ¶ 4 (1995) (*quoting 1984 Attribution Order*, 97 F.C.C.2d at 999).

[692] *Attribution NPRM*, 10 FCC Rcd at 3610 ¶ 4.

[693] LMAs typically provide that the broker may sell advertising time and retain the advertising revenue for the programming it provides to the brokered station.

advertising time for stations pursuant to a JSA. "Control over spot sales by one station affords significant power over the other."[694] Thus, JSAs raise concerns regarding the ability of smaller broadcasters to compete, and may negatively affect the health of the local radio industry generally. JSAs put pricing and output decisions in the hands of a single firm. Instead of stations competing against one another, a single firm sells packages of time for all stations, eliminating competition in the market.

320. We have not previously attributed JSAs based on our earlier conclusion that JSAs do not convey sufficient influence or control over a station's core operations to be considered attributable.[695] While we have recognized the DOJ's concerns as to the impact of same-market radio JSAs on competition, we noted that the DOJ and the Commission's concerns may differ in certain respects.[696] We have previously distinguished JSAs and LMAs, finding that only LMAs have the ability to affect programming, personnel, advertising, physical facilities, and other core operations of stations.[697] There are several reasons for our policy change. Upon reexamination of the attribution issue, we find that, because the broker controls the advertising revenue of the brokered station, JSAs have the same potential as LMAs to convey sufficient influence over core operations of a station to raise significant competition concerns warranting attribution.[698] As with LMAs, licensees of stations subject to

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[694] *1999 Attribution Report and Order*, 14 FCC Rcd at 12612 ¶ 121.

[695] *Id.* at 12612 ¶ 122. However, we left open the possibility that JSAs could threaten competition, and retained discretion to review cases involving radio or television JSAs on a case-by-case basis if it appeared that such JSAs pose competition or other concerns. *Id.* at 12613 ¶ 123. *See, e.g., Shareholders of the Ackerly Group, Inc. (Transferor) and Clear Channel Corp. (Transferee)*, 17 FCC Rcd 10828 (2002).

[696] *1999 Attribution Order*, 14 FCC Rcd at 12612 ¶ 122.

[697] *Id.*

[698] In 1996, we revisited the issue of whether to attribute JSAs. *See Review*

JSAs typically receive a monthly fee regardless of the advertising sales or audience share of the station. Therefore, licensees of stations subject to JSAs have less incentive to maintain or attain significant competitive standing in the market.

321. Although we continue to believe that JSAs may have some positive effects on the local radio industry, we find that the threat to competition and the potential impact on the influence over the brokered station outweighs any potential benefits and requires attribution. As with our decision in 1992 to attribute radio LMAs, we find that modification of our regulation also is warranted given the need for our attribution rules to reflect accurately competitive conditions of today's local radio markets.[699] We noted then, and it still holds true today, that it would be inconsistent with our rules to allow a local station owner to substantially broker a station, whether pursuant to an LMA or JSA, that it could not own under the local radio ownership limits.[700]

322. Some commenters argue that we should continue to exempt JSAs from attribution because they produce a public

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of the Commission's Regulations Governing Attribution of Broadcast Interests, 11 FCC Rcd 19895, 19911 (1996) ("*1996 Attribution FNPRM*"). We considered whether JSAs present diversity and competition concerns, and whether a company could potentially exert market power by controlling a certain amount of the advertising revenue share in the market. In declining to attribute JSAs, we concluded that they do not convey the degree of influence or control over station programming or core operations such that they should be attributed. *1999 Attribution Order*, 14 FCC Rcd at 12612 ¶ 122.

[699] In 1992, based on concerns about competition and diversity, we attributed radio LMAs where an entity owns a station in a local radio market and brokers another station in the market for more than 15 percent of the brokered station's broadcast hours per week. *1992 Radio Ownership Report and Order*, 7 FCC Rcd at 2788. In 1999, we attributed television LMAs. *See 1999 Attribution Report and Order*, 14 FCC Rcd at 12597 ¶ 83.

[700] *1992 Radio Ownership Report and Order*, 7 FCC Rcd at 2788- 89 ¶ 65.

interest benefit.[701] Others believe that we either should treat JSAs the same as LMAs in our competition analysis,[702] or that we should require prior approval for both JSAs and LMAs.[703] Clear Channel argues that "[n]othing has transpired over the succeeding two years [since we decided not to attribute JSAs] that would justify reconsideration of these positions."[704] We disagree with Clear Channel. Our experience administering the local radio ownership rule convinces us that we need to modify our attribution policy with regard to JSAs for the above reasons. Although, like LMAs, JSAs might produce public interest benefits, we find that JSAs may convey sufficient influence or control over advertising to be considered attributable.[705]

323. We believe that a 15 percent advertising time threshold will identify the level of control or influence that would realistically allow holders of such influence to affect core operating functions of a station, and give them an incentive to do so. At the same time, a 15 percent threshold will allow a station the flexibility to broker a small amount of advertising time through a JSA with another station in the same market

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[701] Clear Channel Comments in MM Docket No. 01-317 at 27; Cox Comments in MM Docket No. 01-317 at 17-18; Cumulus Comments in MM Docket No. 01-317 at 15 n.10; Clear Channel Reply Comments in MM Docket No. 01-317 at 5 n.7.

[702] Dick Broadcasting Comments in MM Docket No. 01-317 at 8; Eure Comments in MM Docket No. 01-317 at 2; Idaho Wireless Comments in MM Docket No. 01-317 at 9; Hodson Comments in MM Docket No. 01-317 at 9.

[703] North American Comments in MM Docket No. 01-317 at 17-18; Dick Broadcasting Comments in MM Docket No. 01-317 at 8; Idaho Wireless Comments in MM Docket No. 01-317 at 9.

[704] Clear Channel Comments in MM Docket No. 01-317 at 27.

[705] As evidence of potential adverse competitive effects pursuant to the interim policy adopted in the *Local Radio Ownership NPRM*, we considered the presence of both LMAs and JSAs in the relevant radio market. *Local Radio Ownership NPRM*, 16 FCC Rcd at 19896 ¶ 86.

without that brokerage rising to an attributable level of influence. We believe that the 15 percent threshold (which is the same threshold used for determining attribution of radio and television LMAs) balances these interests.[706]

324. Under our modified rules, JSAs currently in existence will be attributable. Parties with existing, attributable JSAs in Arbitron Metros under our new rules will be required to file a copy of the JSA with the Commission within 60 days of the effective date of this *Order*.[707] For JSAs involving stations located outside of Arbitron Metros, we will require such JSAs to be filed within 60 days of the effective date of our decision in Docket No. 03-130, unless a different date is announced in that decision. In addition, we are modifying FCC Application Forms 314 and 315 to require applicants to file attributable JSAs at the time an application is filed, regardless of whether the markets implicated by the application are located in Arbitron Metros.

325. *Existing JSAs*. We are aware that attribution of in-market radio JSAs may affect licensees' compliance with the modified local radio ownership rules. In addition, we do not want to unnecessarily adversely affect current business arrangements between licensees and brokers. Therefore, we will give licensees sufficient time to make alternative business arrangements where they have in-market JSAs entered into prior to the adoption date of this *Order* that would cause them to exceed relevant ownership limits. In such situations, parties will have 2 years from the effective date of this *Order* to terminate agreements, or otherwise come into compliance with the local radio ownership rules adopted herein.[708] However, if

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[706] *See 1999 Attribution Report and Order*, 14 FCC Rcd at 12598 ¶ 85 n.183.

[707] Both the licensee and the broker should submit copies of their JSAs as supplements to their Ownership Reports on file at the Commission.

[708] This includes JSAs involving radio stations in non-Metro markets. We believe the two-year time grace period will give sufficient time for us to

a party sells an existing combination of stations within the 2-year grace period, it may not sell or assign the JSA to the new owner if the JSA causes the new owner to exceed any of our ownership limits; the JSA must be terminated at the time of the sale of the stations. JSAs that do not cause a party to exceed the modified local radio rules may continue in full force and effect and may be transferred or assigned to third parties. Finally, parties are prohibited from entering a new JSA or renewing an existing JSA that would cause the broker of the station to exceed our media ownership limits.

3. Waiver Standards

326. In the *Local Radio Ownership NPRM*, we requested comment on how we should analyze proposed radio station transactions involving failed, failing, unbuilt, or silent stations.[709] We presented this question in terms of our consideration of a case-by-case competition analysis of radio station transactions (as opposed to requesting specific comment on potential waiver standards), and we in fact received very few comments addressing this issue.[710] In light of our rejection of a case-by-case analysis for radio transactions, the other changes we are making to the local radio ownership rule, and the dearth of comments on this issue, we decline at this time to adopt any specific waiver criteria relating to radio station ownership. Parties who believe that the particular facts of their case warrant a waiver of the local radio ownership rule may seek a waiver under the general "good cause" waiver standard in our rules.[711]

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conclude the proceeding in MB Docket No. 03-130 and give parties sufficient time thereafter to take any necessary action to come into compliance with our media ownership rules.

[709] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19891-92 ¶¶ 74-77.

[710] *See* MMTC Comments in MM Docket No. 01-317 at 53.

[711] 47 C.F.R. § 1.3.

C. Cross Ownership

327. In this section we address (1) the newspaper/broadcast cross-ownership rule[712] and (2) the radio-television cross-ownership rule[713] to determine whether they are necessary in the public interest pursuant to Section 202(h). Based on the record in this proceeding, we find that neither our current nation-wide prohibition on common ownership of daily newspapers and broadcast outlets in the same market nor our cross-service restriction on commonly owned radio and television outlets in the same market, is necessary in the public interest. With respect to both rules, we conclude that the ends sought can be achieved with more precision and with greater deference to First Amendment interests by modifying the rules into a single set of cross-media limits described below.

1. Newspaper/Broadcast Cross-Ownership Rule

328. Adopted in 1975, the newspaper/broadcast cross-ownership rule prohibits in absolute terms common ownership of a full-service broadcast station and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication.[714] The rule was intended to promote media competition and diversity,[715] yet the rule makes no allowance for the size of the market at issue, the number of broadcast outlets or newspapers in the market, or the variety of other media interests that serve the market. When it adopted

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[712] 47 C.F.R. § 73.3555(d).

[713] 47 C.F.R. § 73.3555(c).

[714] For AM radio stations, the service contour is the 2mV/m contour, 47 C.F.R. § 73.3555(d)(1); for FM radio stations, the service contour is the 1mV/m contour, *id.* § 73.3555(d)(2); for TV stations, the service contour is the Grade A contour, *id.* § 73.3555(d)(3). A daily newspaper is one that is published in the English language four or more times per week. *Id.* § 73.3555 n.6.

[715] *1975 Multiple Ownership Second Report and Order*, 50 F.C.C.2d at 1074.

the rule, the Commission grandfathered combinations in many markets (so long as the ownership of the combination remained the same), but it required divestiture of properties in highly concentrated markets. These so-called highly concentrated markets were those in which a combination of newspaper and broadcast outlets would be expected to be the most harmful to media diversity.

329. The Commission examined the newspaper/broadcast cross-ownership rule and several other broadcast ownership rules in its first biennial review in 1998.[716] The Commission concluded in its 1998 Biennial Review Report that the newspaper/broadcast cross-ownership rule continued to serve the public interest because it furthered diversity, and therefore should be retained.[717] However, the Commission noted that the rule might not be necessary to achieve its intended public interest benefits under all circumstances. More specifically, the Commission stated that "[t]here may be instances, for example, in which, given the size of the market and the size and type of the newspaper and broadcast outlet involved, sufficient diversity and competition would remain if a newspaper/broadcast combination were allowed."[718] Thus, the Commission committed to undertaking a rulemaking proceeding to tailor the rule accordingly.[719] That proceeding

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[716] *1998 Biennial Regulatory Review*, *Notice of Inquiry*, 13 FCC Rcd 11276 (1998) (*"Biennial NOI"*). The Commission incorporated the record from the *Newspaper/Radio NOI* into the record of the *Biennial NOI*. *See id.* at 11286 ¶ 30.

[717] *1998 Biennial Review Report*, 15 FCC Rcd at 11105-08 ¶¶ 89-93.

[718] *Id.* at 11105 ¶ 88. The Newspaper Association of America ("NAA") challenged the Commission's decision not to repeal the rule. *Newspaper Ass'n of America v. FCC*, Case No. 00-1375 (D.C. Cir. filed Aug. 16, 2000). By order dated August 30, 2000, the court held the case in abeyance.

[719] *Id.* In its 2000 biennial regulatory review proceeding, the Commission did not alter the recommendations it had made with respect to the newspaper/broadcast cross-ownership rules in the 1998 biennial review proceeding. *See 2000 Biennial Regulatory Review*, 16 FCC Rcd 1207

was commenced in 2001,[720] and later was made part of this biennial review proceeding.[721]

330. Upon review, we now conclude that (1) the rule cannot be sustained on competitive grounds, (2) the rule is not necessary to promote localism (and may in fact harm localism), and (3) most media markets are diverse, obviating a blanket prophylactic ban on newspaper-broadcast combinations in all markets.[722] Instead, we will review proposed license transfers and renewals involving the combination of daily newspapers and broadcast properties only to the extent that they would implicate the cross-media limits discussed below.

a. Competition

331. We first define the relevant product and geographic markets in which broadcasters and newspapers compete, and then assess whether the rule is necessary to promote competition in these markets. As we noted in the newspaper/broadcast proceeding, our focus is on the primary economic market in which broadcast stations and newspapers compete: advertising.[723] Our concern is not related to competition in advertising markets themselves, but is instead

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(2001).

[720] *Newspaper/Broadcast Cross-Ownership NPRM*, *supra*.

[721] *Notice*, 17 FCC Rcd at 18506 ¶ 7.

[722] A number of parties raise Constitutional objections to the rule. *See, e.g.*, NAA Comments at 102-14. To the extent that our local broadcast ownership regulatory framework may prohibit some newspaper/broadcast combinations, we addressed this argument in the Legal Framework section, above. We address the comments of those parties who have argued that we should change the way we apply the rule in primarily Spanish language markets (*e.g.*, Arso Comments and Caribbean Comments in MM Docket No. 01-235) in the section on Cross-Media Limits, *infra*.

[723] *Newspaper/Broadcast Cross-Ownership NPRM*, 16 FCC Rcd at 17292 ¶ 19.

directed at the ability of broadcasters to compete for advertising dollars. If free over-the-air broadcasting is to remain vibrant, broadcasters must be able to organize efficiently and compete for advertising dollars. We look, therefore, to the sole source of revenue for these stations – advertising – to define the product market.[724]

332. We conclude, based on the record in this proceeding, that most advertisers do not view newspapers, television stations, and radio stations as close substitutes. To begin with, the Department of Justice and several federal courts have concluded that the local newspaper market is distinct from the local broadcast market.[725] This conclusion is supported by a number of commenters and MOWG Study No. 10, by Anthony Bush, which found "weak substitutability" between various local media outlets for purposes of local advertising sales.[726] Cox argues, for instance, that advertisers place ads in television, radio, and newspapers for different reasons.[727] CWA asserts that newspapers and television are separate local media markets, with weak substitution by consumers and advertisers.[728] Gannett and Hearst argue that very little

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[724] A product market includes identical products, products with such negligible differences that buyers regard them as substitutes, and other products that buyers regard as such close substitutes that a slight price increase in one will induce shifts of demand to the other. *See DOJ/FTC Merger Guidelines*.

[725] *See, e.g., United States v. Jacor Communications Inc.*, 1996 WL 784589 at *10 (S.D. Ohio 1996); *Community Pub. Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1155-57 (W.D. Ark. 1995).

[726] MOWG Study No. 10. Bush develops a model of business behavior in purchasing advertising for use in sales activities. He estimates elasticities of substitution and finds weak substitutability for advertising between newspaper, broadcast TV, and radio.

[727] Cox argues, for example, that while television is used to build and maintain a brand, newspapers are used to move volumes of products. *See* Cox Comments at 17-18.

[728] *See* CWA Comments at 9-1; AFL-CIO Comments, Baker Study, at 5-7.

advertising substitution exists between daily newspapers and broadcast outlets. They claim that newspapers, radio, and TV attract different portions of local advertising dollars, which refutes the notion that common ownership has any adverse impact on advertising rates or any other competition concerns.[729] Thus, at least for purchasers of advertising time, we find that newspapers, television, and radio are not good substitutes and therefore make up distinct product markets. A newspaper/broadcast combination therefore is not a horizontal merger and cannot adversely affect competition in any product market. Neither is the combination a vertical merger, because neither type of entity sells inputs to the other in the production chain, as in a supplier-customer relationship.[730]

333. Some commenters criticize MOWG Study No. 10 and argue that radio, TV, and newspapers, compete vigorously for advertising dollars.[731] Both Economists Incorporated ("EI")

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[729] *See* Gannett Comments at 15-17; Hearst Comments at 8-10; Hearst Comments in MM Docket No. 01-235 at 14.

[730] *See* Hearst-Argyle Reply Comments at 4 n.8 (citing *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir. 1974); *Emhart Corp. v. USM Corp.*, 527 F.2d 177 (1st Cir. 1975)). Although the merging of newspapers and television stations may result in sharing of inputs, sharing of inputs is distinct from vertical integration, which involves merging of firms where the output of one becomes the input of the other.

[731] Many of the commenters who assert that there is vigorous competition and strong substitution among media advocate elimination of the cross-ownership rules. They argue that consolidation of owners between any two media will not result in a significant increase in advertising prices because advertisers substitute across virtually all media. Hearst-Argyle, for example, asserts that its own analysis of prior studies show that local advertisers view newspaper and broadcast advertising as substitutes for one another, and national advertisers may view newspaper and broadcast advertising similarly. It concludes that all these results, combined with the increase in the number of media outlets, support repeal of the rule. Hearst-Argyle at 1-8 (referencing Barry J. Seldon, R. Todd Jewell, & Daniel M. O'Brien, *Media Substitution and Economies of Scale in Advertising*, 18 INT'L J OF INDUS ORG 1153 (2000); Barry J. Seldon & Chulho Jung, *Derived Demand for*

and Jerry Hausman argue that MOWG Study No. 10 contains measurement errors.[732] These commenters argue that there are two sources of measurement error: (1) the SQAD radio and television advertising rate data measures national and regional, but not local advertisers;[733] and (2) the study, rather than measuring actual local newspaper ad prices, constructs them. Both critiques suggest that these measurement errors lead to bias. EI does not explain whether it believes the bias is in the direction toward too little or too much substitution among media, but Hausman argues that MOWG Study No. 10 is biased in the direction of too little substitution.[734] We recognize the measurement errors associated with the use of SQAD data. Bush used this data because there is no source of data available to the public on actual local advertising prices. As the best public data available, we believe the SQAD data is a reasonable proxy for actual local advertising prices.[735] As for Hausman's claim that use of SQAD prices biases the results in the direction of too little substitution, we believe that Hausman's arguments apply to a simple linear regression, not the model or estimation technique used by Bush. We believe that the effects of these measurement errors may cancel out such that the estimates of Bush are unbiased. Accurate data are required in order to examine this possibility. Bush used, however, available and

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Advertising Messages and Substitutability Among the Media, 33 Q. REV OF ECON AND FIN 71 (1993)).

[732] *See* Fox Comments, Appendix C, Economist Incorporated; Clear Channel Comments, Hausman Statement at 11-18. *See* Appendix E for a more complete summary of the criticisms by Professor Hausman and Dr. Owen and our response.

[733] SQAD, Inc. is an independent media research company that produces measures of the costs of purchasing advertising spots on radio and TV.

[734] Clear Channel Comments, Hausman Statement at 17. (Professor Hausman's statement is part of Clear Channel's filing, which advocates relaxation or elimination of radio ownership rules in local markets.)

[735] Measurement errors due to use of SQAD data are discussed more fully in Appendix E.

public data in his study. Therefore, we recognize the limitations of the data in the Bush study and assign the study an appropriate weight while considering other evidence on the record.

334. Hausman offers as evidence regressions that show significant correlation between the prices of advertising on various media.[736] Hausman's analysis consists of regressing the price of advertising on radio on a set of variables that include the price of advertising on two other media (broadcast TV and newspapers) and various measures of ownership concentration in a market. He reports no significant positive relationship between radio ad pricing and concentration, but does find significant correlation between the prices of radio advertising on the price of advertising on other media. We are reluctant, however, to conclude that this correlation implies strong substitution in the advertising market. First, Hausman's regressions omit important variables that may result in bias.[737] Second, the data used for Professor Hausman's study were not made available in the record of this proceeding. As a result, neither the Commission nor other interested parties have had an opportunity to perform independent analysis of the data to either confirm or refute Professor Hausman's conclusions. Third, Hausman studies the substitution between radio and other forms of media using a simple linear regression model, rather than a simultaneous equation model.[738]

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[736] *See* Clear Channel October 15, 2002, Ex Parte, Hausman Statement, Table 3 at 17.

[737] *See* Clear Channel Comments, Hausman Statement at Table 3. Usually, when econometricians estimate equations with the price of a good as a dependant variable, such as a demand or supply equation, the quantity or income generated by that good is included as an independent variable. Hausman includes neither the quantity nor income in his regressions. Omission of such a key variable often leads to bias in the coefficients of the included independent variables. *See* Peter A. Kennedy, A GUIDE TO ECONOMETRICS, (3rd ed. 1992) at 91.

[738] Systems of equations, such as a group of demand equations, allow more

335. Further, other empirical studies confirm our conclusion that advertisers do not view ads in newspapers and broadcast TV as substitutes. Silk, Klein, and Berndt examine advertising substitution among eight media in the national markets. [739] They report only weak substitution between newspapers and spot TV; they also report that advertising on network TV and newspapers are complements, not substitutes. Busterna estimates demand functions in five media (including network and spot television) and concludes that "cross-elasticity of demand between newspapers and other media is consistently nil across all media."[740] Reid and King conduct a study based on interviewing and surveying advertising managers in national markets and conclude that these managers did not view television and newspapers to be good substitutes for advertising.[741] Finally, the Department of Justice and several federal courts have concluded that the local newspaper market is distinct from the local broadcast market.[742]

336. Although the studies discussed in the paragraph above focus on national advertising markets, not local ones, the results likely extend to local markets. We see no evidence that local advertisers would more easily substitute between TV and newspapers than national advertisers. Indeed, evidence suggests that local advertisers are less likely to substitute among media than national advertisers. For example, classified

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efficient estimation than regressing one equation, especially when economic theory is employed to constrain estimates across equations. By efficient, we mean here that the uncertainty of the parameter estimates, given the underlying data, is reduced. *See*, e.g., Silk, Klein, and Berndt, *supra* note 522, and MOWG Study No. 10. For more discussion on estimating systems of equations, *see* William Greene, ECONOMETRIC ANALYSIS (1990) at 509-542.

[739] Silk, Klein, and Berndt, *supra*.

[740] John C. Busterna, *The Cross-Elasticity of Demand for National Newspaper Advertising*, 64 J Q 349 (Summer/ Autumn 1987).

[741] Reid and King, *supra* note 523 at 292-307.

[742] *Supra* note 728.

ads, an important component of local advertising, comprising 40% of newspaper advertising revenues, offer affordable local advertising that is not available on broadcast TV.[743] In addition, newspapers provide unique features (*e.g.*, coupons to be redeemed with local retailers) that are not available through broadcast TV or radio.[744] We believe, therefore, that findings of weak substitution between newspapers and broadcast TV for national advertisers likely apply to local buyers as well.

337. Indeed, Cox states that aggregate advertising prices in markets with grandfathered media combinations are consistent with prices in other markets after adjusting for market size.[745] Gannett states that the combined local measurable advertising market revenue share of a newspaper and television station it now owns in Phoenix, Arizona, was nearly the same prior to 1999, when the properties came under common ownership, as it is now.[746] Further, the synergies and cost reductions of joint-ownership may translate into increased, rather than decreased competition within each service. Media General provides a number of case studies that suggest increased services and reduced costs through newspaper and broadcast TV partnerships.[747] By precluding the efficiencies inherent in combinations, the rule likely harms consumers by limiting the

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[743] Newspaper Association of America website (*http://www.naa.org*). The NAA estimates that 48% of local newspaper advertising dollars are allocated to classified ads, which have no good substitutes on television or radio media. NAA Comments at 55-65.

[744] Cox asserts that advertisers place ads in television, radio and newspapers for different reasons. *See* Cox Comments at 16-21.

[745] *Id.* at 16-21 (citing the Media Market Guide published by SQAD, Inc.).

[746] Gannett Comments at 14-16 and Exhibit B. Schurz Communications, Inc. similarly argues that two grandfathered combinations in South Bend, Indiana, have not caused the percentage of local advertising dollars spent with newspapers, television and/or radio stations to differ from that spent by national advertisers. Schurz Comments at 8-10.

[747] Media General Comments, Appendix 3, Statement of James K. Gentry.

development of new, innovative media services that would flow from a more efficient, combined entity.[748]

338. A number of commenters believe the rule is necessary to protect advertisers that substitute between newspapers and broadcast TV. UCC argues that cross-media consolidation will likely harm advertisers in local markets. It concludes that consumers will have to pay more for products in a market with commonly owned newspapers and broadcast stations because advertisers will have to pay more to advertise and these increased costs will be passed on to consumers.[749] Others, such as Caribbean International News Corp., assert that in markets where there are newspaper/broadcast combinations, the commonly owned firms aggressively market multimedia advertising packages, creating a competitive imbalance.[750] CFA contends that a review of the literature on vertical and conglomerate mergers identifies major concerns about such mergers in concentrated markets where dominant players can employ a range of anticompetitive tactics (e.g., raising entry barriers, cross-subsidization, price squeezing, price discrimination, market foreclosure and exclusive deals) to thwart competition.[751]

339. Although the overall evidence appears to suggest little substitution between newspapers, broadcast TV, and radio, we agree that there may be a small group of advertisers that benefit

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[748] NAB Comments at 63-65, 101. *See also* Belo Comments at 1-8 (claiming its Dallas-Fort Worth combination has increased synergies and economies of scale that benefit the public); Cox Comments at 70 (claiming co- ownership benefits the operation of local media markets).

[749] *See* UCC Comments at 11-13.

[750] Caribbean Comments at 27-35. Caribbean reports that such cross-ownership has created a situation where one owner (with two daily newspapers) garners 43% of the advertising revenues for traditional media outlets in Puerto Rico.

[751] CFA Comments at 96-121; *see also* Mid-West Comments at 5-6; UCC Comments at 13.

from using various media to advertise their products. These advertisers could be harmed if owners of newspaper/broadcast combinations can identify this group and price discriminate -- charge higher prices to this group than they charge to other advertisers for the same product.[752] As explained above, however, the Commission is not charged with protecting competition in the advertising markets. These advertisers, however, are not without remedy. The Department of Justice, the Federal Trade Commission, as well as state attorney generals, review mergers generally and are concerned about the effects in the advertising market. Further, both federal and state antitrust laws allow private suits to be brought. The Commission's interest in advertising markets extends only so far as issues relating to advertisers might affect the ability of FCC licensees to serve the public interest, convenience, and necessity. Since we see no potential harm to broadcasters, television viewers or radio listeners, the concern raised regarding harm to an ill-defined subset of advertisers does not justify retaining the rule.[753]

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[752] *DOJ/FTC Merger Guidelines* § 1.12 explains: "Existing buyers sometimes will differ significantly in their likelihood of switching to other products in response to a small but significant and non-transitory price increase. If a hypothetical monopolist can identify and price differently to those buyers ("targeted buyers") who would not defeat the targeted price increase by substituting to other products in response to a 'small but significant and nontransitory' price increase for the relevant product, ... then a hypothetical monopolist would profitably impose a discriminatory price increase on sales to targeted buyers. This is true regardless of whether a general increase in price would cause such significant substitution that the price increase would not be profitable."

[753] There is nothing in the record regarding the number of advertisers that may be targeted for such price discrimination, nor the magnitude of the potential price increases. We believe, however, that the number of advertisers that may be potential targets of price discrimination would be very small for most newspaper/broadcast combinations.

340. In any event, even if we were to focus exclusively on the advertising markets alone, the potential for harm to advertisers who substitute between various media outlets would be greatest if one entity owned all the newspapers and all the broadcast facilities. Through the constraining effect of our local radio and TV ownership rules, we expect that the majority of the potential newspaper/broadcast combinations would continue to face competition from separately owned media outlets in the local market.

341. Finally, consumers experience print and electronic media in very different ways.[754] Electronic media can provide real-time information concerning current events, sporting contests, or other time sensitive matters. Electronic media also can be experienced more passively, as users may engage in other activities simultaneously while enjoying television or radio programming. Print media, on the other hand, require a higher degree of engagement by the consumer, but they also are capable of delivering greater depth of coverage. These differences are significant from a competitive standpoint both for consumers and, as described above, for advertisers. For consumers this means that the programming or content is different between newspapers and broadcast TV. Advertisers will view newspapers and TV broadcast as imperfect substitutes. A newspaper-broadcast combination, therefore, cannot adversely affect competition in any relevant product market. Accordingly, we cannot conclude that the current newspaper-broadcast cross-ownership rule is necessary to promote competition.

b. Localism

342. The record indicates that the newspaper/broadcast cross-ownership prohibition is not necessary to promote

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[754] For a summary table that compares the characteristics of print with electronic media, see David W. Stewart and Scott Ward, *Media Effects on Advertising*, MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH (1994) at 328.

broadcasters' provision of local news and information programming. Indeed, evidence suggests that the rule actually works to inhibit such programming. One of the strengths of daily newspapers is their ability to provide in-depth coverage of local news and events.[755] Many newspapers provide local content that far exceeds that provided by local broadcast outlets. Newspapers and broadcast stations – particularly television stations -- continue to be the dominant sources, in terms of consumer use, for news and information to local communities.[756] Our rules should promote the ability of newspapers, television stations, and all other sources of local news and information to serve their communities.

343. Although the Commission does not regulate quality of programming, and, indeed, such regulation of content would raise significant First Amendment concerns, we have historically sought to promote the ability of local stations to serve their communities through news and public affairs programming. Our MOWG studies suggest a direct correlation between the association of a broadcast outlet with a published daily newspaper and the quality of the local broadcast news. In MOWG Study No. 7, "The Measurement of Local Television News and Public Affairs Programs," the authors found that television broadcast stations affiliated with a major broadcast television network that are "co-owned with newspapers experience noticeably greater success [in terms of] quality and quantity of local news programming than other network affiliates."[757] Co-ownership, the authors explain, refers to a

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[755] *E.g.*, Tribune Comments in MM Docket No. 01-235 at 43-52 (core mission of daily newspapers is to provide local news).

[756] MOWG Studies No. 8; MOWG Study No. 3, *Consumer Substitution Among Media* by Joel Waldfogel (Sept. 2002)("MOWG Study No. 3"); *see also* AFL-CIO Comments at 34-36; AFTRA Comments at 26-28; Comments of CWA at 5-9.

[757] MOWG Study No. 7, *The Measurement of Local Television News and Public Affairs Programs*, by Thomas C. Spavins, Loretta Denison, Jane Frenette and Scott Roberts (Sept. 2002) at 1 ("MOWG Study No. 7").

company that owns at least one television station and one daily newspaper; the two need not necessarily serve the same market.[758] Accordingly, while eliminating the rule may not be essential to achieve the efficiencies of common ownership -- because the rule prohibits only ownership of newspapers and broadcast stations serving the same market -- the breadth and depth of news coverage can be enhanced by collocation and the rule's elimination will increase the opportunities to realize these benefits by permitting combinations in areas where the rule currently prohibits them.

344. Specifically, MOWG Study No. 7 found that while non-network owned but network-affiliated stations provide, on average, 14.9 hours per week of local news and public affairs programming, newspaper-owned affiliated stations provide almost 50% more such programming, averaging 21.9 hours per week.[759] In addition, the study found that the average number of hours of local news and public affairs programming provided by the same-market cross-owned television-newspaper combinations was 25.6 hours per week, compared to 16.3 hours per week for the sample of television stations owned by a newspaper that is not in the same market as the station.[760] Not only do newspaper-owned stations provide more news and public affairs programming, they also appear to provide higher-quality programming, on average, at least as measured by ratings and industry awards. The ratings for newspaper-owned stations' 5:30 and 6:00 pm newscasts during the November 2000 sweeps period averaged 8 compared to an average rating of 6.2 for non-newspaper-affiliated stations.[761] More

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[758] *Id.* at 3, note 1.

[759] *Id.* at 3.

[760] This information was derived from an examination of the data included in the appendices of MOWG Study No. 7, as well as information in the record of this proceeding regarding the same market television/newspaper combinations. *See* NAA Comments at 14-15.

[761] *Id.*

dramatically, newspaper-owned stations received 319 percent of the national average per station Radio and Television News Directors Association ("RTNDA") awards, and 200 percent of the national average A. I. DuPont Awards (in association with the School of Journalism of Columbia University) in 2000-2001.[762] During that same period, non-newspaper-owned stations received RTNDA Awards at a rate of only 22 percent of the national average.[763] They received DuPont Awards at a rate of 39 percent of the national average per station.[764] The authors conclude that, "within the overall category of network affiliates, there appears to be a systematic divergence between stations that are co-owned with a newspaper publisher relative to all other affiliates. For each quality and quantity measure in our analysis, the newspaper network-affiliated stations exceed the performance of other, non-newspaper-owned network affiliates."[765]

345. These conclusions are supported by a study done by the Project for Excellence in Journalism ("PEJ") in which PEJ analyzed five years of data on ownership and news quality. PEJ concluded that cross-owned stations in the same Nielsen Designated Market Area were more than twice as likely to receive an "A" grade as were other stations.[766] On the whole,

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[762] *Id.* at 4.

[763] *Id.*

[764] *Id.* While there is controversy in the record about some aspects of this study, no commenter has critiqued the newspaper-related evidence.

[765] *Id.*

[766] Project for Excellence in Journalism, *Does Ownership Matter in Local Television News: A Five-Year Study of Ownership and Quality* (Feb. 17, 2003) at 10 ("PEJ Study"). Elsewhere in this *Report and Order*, we determine that the results of the PEJ study are statistically insignificant and cannot be considered reliable or convincing evidence. *See* National TV Ownership Rule Section VII(A), *infra*. We use PEJ's filing here solely as a source of anecdotal evidence, not as a statistical study, and do not base our conclusions regarding the newspaper/broadcast cross-ownership rule upon it.

cross-owned stations were more likely to do stories focusing on important community issues and to provide a wide mix of opinions, and they were less likely to do celebrity and human-interest features.[767]

346. The benefits of combined ownership are not likely to be achieved through joint ventures as opposed to combined ownership. Besen and O'Brien present a persuasive theoretical argument that the efficiencies of joint ownership of newspaper and television will likely exceed the efficiencies of joint ventures between the two.[768] The authors argue that joint ventures confront three classes of issues that hinder their ability to achieve efficient joint production: (1) the costs of reaching the agreement; (2) incentives to withhold private information; and (3) incentives to take actions that are not in the best interests of the joint venture. Besen and O'Brien maintain that joint ownership mitigates these possible hindrances. The prospective benefit of some media consolidation in the form of non-trivial efficiencies – and, conversely, the opportunity cost from the loss of such benefits through a rule prohibiting certain combinations – weigh against retention of our newspaper/broadcast cross-ownership rule. The authors provide no estimate of the value of these benefits.

347. Many commenters illustrate how combining a newspaper's local news-gathering resources with a broadcast platform contributes to, rather than detracts from, the production of local news programming that serves the community. These results follow from the particular journalistic experience associated with local daily newspapers, as well as the tangible economic efficiencies, such as sharing of technical support staff, which can be realized through common ownership of two media outlets. Such efficiencies may increase

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[767] *Id.*

[768] Gannett Comments in MM Docket No. 01-235, Exhibit C, Besen and O'Brien, *An Economic Analysis of the Efficiency Benefits from Newspaper/Broadcast Station Cross-Ownership.*

the amount of diverse, competitive news and local information available to the public, and allow the combined entities to compete more effectively in an increasingly fragmented and competitive market.[769]

348. There are several anecdotes in the record that illustrate how efficiencies resulting from cross-ownership translate into better local service. These efficiencies are particularly important as consumers demand almost instantaneous delivery of news – both locally and nationally – and even more in-depth coverage of complex issues.[770] Gannett, which owns a newspaper/television combination in Phoenix, Arizona,[771] reports that the quantity and diversity of area news coverage it provides has increased as a result of its ability to leverage the combined resources of the two outlets. According to Gannett, media integration has improved efficiency, particularly in situations characterized by fast-breaking news such as the

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[769] *See* The Times Comments in MM Docket No. 01-235 at 7-10, Ex. 3 (efficiencies in the Times' grandfathered combination reduce costs for, *e.g.*, training and employee benefits, which reduces pressure on advertising rates and frees up resources for programming efforts); *see also* ALTV Comments in MM Docket No. 01-235 at 7-8; Hearst Comments in MM Docket No. 01-235 at 16-18.

[770] *Compare* Edwin Emery & Michael Emery, THE PRESS AND AM. (5th ed. 1984) at 82 (reporting that it took six weeks for the news of the fighting at Lexington and Concord to reach Savannah, Georgia). Coverage of news events in the early press also tended to be brief, sometimes painfully so. One cannot but feel for the citizens of Philadelphia, for example, who were afforded only 43 words by the *Freeman's Journal* conveying the entire account of the final battle of the revolutionary war: "Be it remembered that on the 17th day of October, 1781, Lieut. Gen. Charles Earl Cornwallis, with about 5,000 British troops, surrendered themselves prisoners of war to His Excellency, Gen. George Washington, Commander-in-Chief of the allied forces of France and America." *See* Emery & Emery, THE PRESS AND AM. at 83 (citing Laurence Greene, AM. GOES TO PRESS (1936)).

[771] Gannett holds this combination pursuant to the retention period formula we instituted when we originally adopted the rule. *See 1975 Multiple Ownership Second Report and Order*, 50 F.C.C.2d at 1076 n. 25.

massive wildfires near Phoenix last year, while the journalists at each outlet retain discretion and exercise independent judgment.[772] Similarly, in Dallas, Texas, where Belo owns a newspaper/television combination,[773] both outlets have been able to cover a wider range of stories through information sharing between the separate newspaper and television news staffs.[774] Belo also operates TXCN, a 24-hour local cable news network, which uses its own news-gathering sources as well as those of Belo's other media properties in the market. This aggregation of news gathering and production resources, Belo asserts, has allowed it to provide more content, to innovate more in its reporting, and to provide more in-depth coverage of locally important issues than it otherwise could.[775]

349. Efficiencies not involving the sharing of news staffs may also be realized through cross-ownership. For example, Gannett explains that, if the restriction on newspaper/broadcast cross-ownership were removed, combinations could share back office expenses, such as accounting, marketing, and human resource functions.[776] Further, once a story has been assembled, the cost of distribution for another use is minimal, but the gains from incremental additional distribution can be

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[772] Gannett Comments at 8-11, Ex. A; Gannett Comments at 4-8, 18 (citing MOWG Study No. 7) and Exh. A (an affidavit from two local managers explaining the working relationships between commonly owned newspapers and broadcast stations in Phoenix, Arizona).

[773] This combination was "grandfathered" at the time of the rule's adoption.

[774] Belo Comments in MM Docket No. 01-235 at 4-7.

[775] *Id. See also* NAA Comments in MM Docket No. 01-235 at 23-24, 29-30, 34 (co-owned broadcast stations and newspapers have won multiple awards for their reporting); Bonneville Comments in MM Docket No. 01-235 at 5-6 (joint operation will result in better content and greater public service); Morris Comments in MM Docket No. 01-235 at 6-12 (co-owned outlets provide superior service); NAB Comments in MM Docket No. 01-235 at 34-43 (combinations are beneficial because, as operations in both entities are strengthened, they can provide better and more innovative media services).

[776] Gannett Comments in MM Docket No. 01-235 at 13-14.

large. This differential increases, rather than reduces, the incentives to create and expand the product sold -- in this case information.[777] As Cox argues, combinations at the local level result in efficiencies that allow media companies to serve their localities better and increase investment in local programming.[778]

350. Although our conclusions pertain to markets of all sizes, newspaper-broadcast combinations may produce tangible public benefits in smaller markets in particular. In this regard, West Virginia Media contends that the cross-ownership restriction impairs coverage of local news and public affairs in small markets by prohibiting combinations that would produce efficiencies and synergies particularly necessary in smaller markets.[779] It argues that the rule may have the unintended effect of stifling local news by prohibiting efficient combinations that would produce better output.[780] We assume that the efficiencies cited by West Virginia Media can benefit small businesses with respect to the production of news and public affairs programming.[781]

351. We disagree with those who argue that the relaxation or elimination of the newspaper/broadcast cross-ownership rule will create additional pressures on local news editors and

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[777] *Id.* at 16-19, Exhibit C; *see also* NAA Comments in MM Docket No. 01-235 at 16-22.

[778] Cox Comments at 73-74 (citing, *e.g.*, Schurz Comments in MM Docket No. 01-235 at 8; Gannett Comments in MM Docket No. 01-235 at 7).

[779] West Virginia Media Comments in MM Docket No. 01-235 at 7 (*citing* Bond & Pecaro, Inc., *A Study to Determine Certain Economic Implications of Broadcasting/Newspaper Cross-Ownership* (July 21, 1998) at 1); Bonneville Comments at 7-8.

[780] West Virginia Media Comments at 1-14 (citing Bond & Pecaro, Inc., *supra*); NAB Comments in MM Dkt. No. 98-35 at Appendix B ; *see also* Media General Comments at 71-75.

[781] In the Grandfathering and Transition Procedures Section VI(D), below, we adopt special provisions with respect to small businesses to further assist them.

directors to curtail coverage of public interest news.[782] For example, according to AFL-CIO, CanWest, whose daily newspapers comprise 30% of Canada's daily newspaper circulation, requires its big city newspapers to publish weekly editorials that are written by, and issued from, headquarters, and does not permit unsigned local editorials to contradict the headquarters editorials.[783]

352. As an initial matter, the issue raised by AFL-CIO regarding CanWest does not address cross-ownership within a market but, instead, addresses the perceived problems of national ownership and corporate centralization. Since our cross-ownership rule is not intended to address such problems, we need not address this argument. Moreover, it is hardly surprising, nor do we find it troubling, that newspaper owners use their media properties to express or advocate a viewpoint. To the contrary, since the beginning of the Republic, media outlets have been used by their owners to give voice to, among others, opinions unpopular or revolutionary,[784] to advocate

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[782] AFL-CIO Comments in MM Docket No. 01-235 at 8-14 (citing Kunkel and Roberts, *Leaving Readers Behind: The Age of Corporate Newspapering*, 23(4) AM. J. R. (May 1, 2001)); Consumers Union Comments in MM Docket No. 01-235 at 52-58; Mid-West Comments in MM Docket No. 01-235 at 3; AFL-CIO Comments at 44-46; NAHJ Comments at 16-17.

[783] AFL-CIO Comments at 44-46.

[784] Concerning the role of spokespersons in the media in the American Revolution, *see* Philip Davidson, PROPAGANDA & THE AMERICAN REVOLUTION (UNC Press, 1941); in the abolitionist movement, *see* Edwin & Michael Emery, THE PRESS & AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA (Prentice Hall 1992) at 121-27 ("Emery & Emery"); in the "muck-raking" movement, *see* Ron Chernow, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. (Random House 1998) at 116-17, 435-53; in the rural populist movement, *see* Howard Zinn, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492 – PRESENT (Harper Collins 2003) at 292 ("Zinn"); in the labor movement, *see The Labor Press Project*, http://faculty.washington.edu/gregoryj/laborpress/ (visited May 21, 2003); in the prohibition movement, *see* John Kobler, ARDENT SPIRITS: THE RISE AND FALL OF PROHIBITION (G.P. Putnam's Sons, 1973) at 42-47, 55-57, 98-101,

particular positions,[785] or to defend, sometimes stridently, social or governmental institutions.[786] Our broadcast ownership rules may not and should not discourage such activity. Nor is it particularly troubling that media properties do not always, or even frequently, avail themselves to others who may hold contrary opinions. Nothing requires them to do

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138-40, 153, 155, 158, 183; in the post-World War II conservative movement, *see* George H. Nash, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945 (Basic Books 1976) at 148-60, and Rick Perlstein, BEFORE THE STORM: BARRY GOLDWATER & THE UNMAKING OF THE AMERICAN CONSENSUS (Hill & Wang 2001) at 114; in the counterculture and anti-Vietnam War movements of the 1960s and 1970s, *see* Ellen Frankfort, THE VOICE: LIFE AT THE VILLAGE VOICE (Morrow 1976), Kevin McAuliffe, THE GREAT AMERICAN NEWSPAPER: THE RISE & FALL OF THE VILLAGE VOICE (Charles Scribner's Sons, 1978); and Zinn, at 494; and in contemporary protest movements, *see* Greg Ruggiero & Stuart Sahulka (Eds.), THE PROGRESSIVE GUIDE TO ALTERNATIVE MEDIA & ACTIVISM (Seven Stories Press 1999); *see also* Ward L. Miner, WILLIAM GODDARD, NEWSPAPER-MAN (Duke U. Press 1962); Arthur Schlesinger, PRELUDE TO INDEPENDENCE, THE NEWSPAPER WAR ON BRITAIN, 1764-1776 (Knopf 1958); Walett, MASSACHUSETTS NEWSPAPERS AND THE REVOLUTIONARY CRISIS, *1763-1776* (Boston, MA Bicentennial Comm., 1974).

[785] Catherine D. Bowen, JOHN ADAMS AND THE AMERICAN REVOLUTION (Little Brown 1950); Milton Flower, John Dickinson, CONSERVATIVE REVOLUTIONARY (UVA Press, 1983); Robert Middlekauff, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789 (Oxford U. Press, 1982); Clinton Rossiter, POLITICAL THOUGHT OF THE AMERICAN REVOLUTION (Harcourt Brace Jovanovich 1963); Maurice R. Cullen, Jr., *Benjamin Edes: Scourge of Tories*, J. Q. (Summer 1974) at 214.

[786] Edwin & Emery, *supra*. at 42-44 (concerning Tory newspaper publisher James Rivington). Other newspaper editors who championed causes passionately include William Randolph Hearst concerning many causes (*see* David Nasaw, THE CHIEF: THE LIFE OF WILLIAM RANDOLPH HEARST (Houghton Mifflin 2001)) and the late Katherine Graham of the Washington Post concerning the Watergate scandal (*see* Carl Bernstein & Bob Woodward, ALL THE PRESIDENT'S MEN (Touchstone/Simon & Schuster, New York, 1974)).

so,[787] nor is it necessarily healthy for public debate to pretend as though all ideas are of equal value entitled to equal airing. The media are not common carriers of speech.[788] It is hardly an indictment of the media to point out that an outlet may be a proponent of an identifiable editorial viewpoint. And the fact that such viewpoints may reflect popular opinion or have widespread appeal is not a ground for government intervention in the marketplace of ideas. Indeed, the very notion of a marketplace of ideas presupposes that some ideas will attract a following and achieve wide currency, while others quietly recede having failed to conquer the hearts and minds of the citizenry. Our Constitution forbids government action to pre-select the winners in this competition or to guarantee the circulation of any particular set of ideas.

353. Nor is it troubling that media properties may allow their news and editorial decisions to be driven by "the bottom line."[789] Again, the need and desire to produce revenue, to

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[787] *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Broadcasters, however, are subject to certain statutory political broadcasting requirements. *See* 47 U.S.C. § 312(a)(7) (broadcast and DBS licensees must make available "reasonable access" to all legally qualified candidates for federal elective office); 47 U.S.C. § 315 ("equal opportunities" to competing legally qualified candidates). The Bipartisan Campaign Reform Act of 2002 contains several content-related provisions applicable to certain FCC regulatees. This Act is now being challenged before a special three Judge panel of the United States District Court for the District of Columbia *McConnell v. FEC*, Civ. No. 02-0582 (D.D.C. 2003).

[788] *See, e.g.*, 47 U.S.C. § 153(10) ("a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier").

[789] *See* CFA Comments at 255 (citing Cranberg, Gilbert, Randal Bezanson, John Soloski, TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY, (Ames: Iowa State, 2001) at 89; and *The Business of News, the News About Business*, Neiman Reports, Summer 1999). It appears that by "[feeling] pressure from the bottom line," CFA means that editors are spending less time on the news and more of their time is being taken up with business concerns such as "plotting marketing strategies or cost-cutting campaigns." *Id.*

control costs, to survive and thrive in the marketplace is a time honored tradition in the American media. Indeed, it was not until newspaper publishers learned to market their papers as tools of commerce that the press became a force in the public debate that lead to the framing of our Constitution.[790] Impair the ability of media outlets to profit and you choke off the capital to which their tap roots reach; strangle the press and the balance of our familiar rights and privileges wither and fall.

354. In short, to assert that cross-owned properties will be engaged in profit maximizing behavior or that they will provide an outlet for viewpoints reflective of their owner's interests is merely to state truisms, neither of which warrants government intrusion into precious territory bounded off by the First Amendment. To the contrary, we are engaged in this exercise precisely because we seek to encourage the airing of diverse and antagonistic viewpoints. It would be odd indeed if our rules were structured to inhibit the expression of viewpoints or to promote only an accepted set of ideas. In light of the overwhelming evidence that combinations can promote the public interest by producing more and better overall local news coverage, we conclude that the current rule is not necessary to promote our localism goal and that it, in fact, is likely to hinder its attainment.

c. Diversity

355. The Commission adopted the newspaper/broadcast cross-ownership rule because it believed that diversification of ownership would promote diversification of viewpoint.[791] This proposition has been both defended and called into question. The Supreme Court found that the newspaper/broadcast cross-ownership rule could be sustained "so long as the regulations are not an unreasonable means for seeking to achieve these

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[790] Edwin and Michael Emery, THE PRESS AND AMERICA (5th Ed. 1984) 51-72.

[791] *1975 Multiple Ownership Second Report and Order*, *supra* note 33.

[public interest] goals."[792] Against the backdrop of the last 27 years' growth in the number, breadth, and scope of informational and entertainment media available and the benefits that may accrue from common ownership, we conclude that a blanket prohibition on the common ownership of broadcast stations and daily newspapers in all communities and in all circumstances can no longer be justified as necessary to achieve and protect diversity. Although we continue to believe that diversity of ownership can advance our goal of diversity of viewpoint, the local rules that we are adopting herein will sufficiently protect diversity of viewpoint while permitting efficiencies that can ultimately improve the quality and quantity of news and informational programming. Accordingly, we will eliminate the newspaper/broadcast cross-ownership prohibition and consider any such proposed merger in light of our new rules.

356. *Benefits of Common-Ownership.* As discussed above in connection with localism, the record indicates that cross-ownership of newspapers and broadcast outlets creates efficiencies and synergies that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public.[793] Cox argues that co-ownership increases source diversity because it enables broadcasters to enhance their delivery of local programming, news, and

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[792] *NCCB*, 436 U.S. at 796.

[793] *See, e.g.*, News Corp. Comments in MM Docket No. 01-235 at 35-37 (since waiver of the rule in 1993, News Corp. has sustained the continued publication and expansion of the *New York Post*); BIC Comments in MM Docket No. 01-235 at 5-6 (broadcasters must grow and consolidate in order to survive and effectively serve the public); Norwell Comments in MM Docket No. 01-235 at 5-6 (economies of scale of combining a broadcast station and a daily newspaper are driven by marketplace realities of competing for limited advertising dollars); Can West Comments at 6 (print journalists can reach a wider audience over TV); Cox Comments at 71-72; of NAA Comments at 11-20 (co-owned affiliates offer superior news and informational content over non-co-owned affiliates).

information.[794] Others assert that the various synergies and profitable ventures between TV broadcasts and newspapers suggest that relaxing the newspaper cross-ownership rule could conceivably help struggling newspapers in some markets and perhaps provide economic justification for creation of newspapers.[795] Thus, relaxing the cross-ownership rule could lead to an increase in the number of newspapers in some markets and foster the development of important new sources of local news and information.[796]

357. Evidence that common ownership can enhance the flow of news and information to the public can be found in grandfathered newspaper-television combinations of which there are 21. Our review of the record indicates that such combinations often serve the public interest by adding information outlets and creating high quality news product. A recent study, for example, determined that, on average "grandfathered" newspaper-owned television stations, during earlier news day parts, led the market and delivered 43% more audience share than the second ranked station in the market and 193% more audience than the third ranked station in the market. These "grandfathered" structures also have created new information outlets in their market, such as Internet sites and local news-oriented cable networks.[797]

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[794] Cox does not address program diversity because it believes that program diversity is irrelevant to newspapers since they do not offer programming. Cox Comments at 71-72.

[795] Bear Stearns Comments at 40.

[796] Media General Comments at 13-21 (arguing that its convergence model has enabled it to deliver better, faster, and deeper local news in Tampa, Florida; Roanoke/TriCities, Virginia; Florence, South Carolina; Columbus, Ohio; and Panama City, Florida).

[797] Miller Comments in MM Docket No. 01-235 at 24-28, Ex. 8. The Miller study looked at only a few of the cross-owned newspaper/broadcast combinations, not all of them. Some commenters discount the importance of these new voices claiming that commonly-owned outlets do not contribute to

358. Moreover, empirical research confirms that newspaper/television combinations frequently do a superior job of providing news and informational programming. MOWG Study No. 7 found that network affiliated TV stations that are co-owned with a newspaper "experience noticeably greater success under our measures of quality and quantity of local news programming than other network affiliates."[798] Similarly, as described above, the Project for Excellence in Journalism's five-year study on local television news found "[s]tations with [newspaper] cross-ownership . . . were more than twice as likely as stations overall to generate "A" quality newscasts."[799] None of the cross-owned stations in the sample received an "F" grade in quality, as compared with 8% of all other stations.[800] It appears that the synergies and efficiencies that can be achieved by commonly located newspaper/broadcast combinations can and do lead to the production of more and qualitatively better news programming and the presentation of diverse viewpoints, as measured by third-parties.[801]

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viewpoint diversity. We address these arguments in the *Common Ownership/Common Viewpoint* section, *infra*.

[798] MOWG Study No. 7 at 2.

[799] PEJ Study, *supra* note 769 at 4, 10.

[800] *Id.* at 10.

[801] We recognize that quality can be subjective. However, both MOWG Study No. 7 and the PEJ Study attempted to use objective measurements of quality. In the case of the former, the number of Radio and Television News Directors Awards and A.I. DuPont Awards was measured. In the latter, a Design Team of 14 respected local television news professionals from a diverse cross-section of companies and regions around the country was assembled. This panel, through the use of survey questionnaires and long-form open-ended discussions developed 6 criteria for assessing the quality of newscasts including story balance via multiple sources and story balance via multiple viewpoints. Project for Excellence in Journalism, *"Does Ownership Matter in Local Television News: A Five-Year Study of Ownership and Quality"* (Feb. 17, 2003) at 2, 21 (Appendix III). *See also* PEJ's March 20, 2003, reply to Network's response.

359. *Harm to Diversity Caused by the Rule.* The newspaper/broadcast cross-ownership rule, as noted above, may be preventing efficient combinations that would allow for the production of high quality news coverage and broadcast programming, including coverage of local issues, thereby harming diversity.[802] Newspapers and local over-the-air television broadcasters alike have suffered audience declines in recent years.[803] In the broadcast area, commenters have reported declines in the ratings of existing outlets as more media enter the marketplace. For example, the number of television stations in the Miami-Ft. Lauderdale and the adjacent West Palm Beach markets has increased from 10 to 25 from 1975 to 2001.[804] As more stations have begun to program local news, however, the ratings for individual stations have dropped.[805] Broadcast groups owned by GE, Disney, Gannett, Hearst-Argyle and Belo have lost 10 to 15% of their aggregate audience in the past five years.[806] Local over-the-air broadcast TV's share of total television advertising dollars, which includes the new broadcast networks, new cable networks and syndication providers, has fallen from 56% in 1975 to 44% in 2000.[807] E.W. Scripps Company argues that consolidation among established media outlets and the proliferation of new media outlets since 1975 requires broadcasters and newspapers

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[802] FOEF Comments in MM Docket No. 01-235 at 22, Table 1, and 29-31; Herald Reply Comments in MM Docket No. 01-235 at 4-5.

[803] *Id.* at 1-2; *see also* NAB Comments in MM Docket No. 01-235 at 9-16, Att. 1 (audience share of traditional media has declined as the share of new outlets, particularly cable systems, DBS and MVPDs has increased).

[804] Tribune Comments in MM Docket No. 01-235 at 25-26. Tribune publishes the *South Florida Sun-Sentinel.*

[805] *Id.* at 26-27.

[806] Miller Comments in MM Docket No. 01-235 at 19-21, Exhibits 5, 6.

[807] *Id.* at 21-22, Exhibit 7.

to grow, consolidate, and achieve critical scale in their local markets to survive and effectively serve the public.[808]

360. Given the decline in newspaper readership and broadcast viewership/listenership, both newspaper and broadcast outlets may find that the efficiencies to be realized from common ownership will have a positive impact on their ability to provide news and coverage of local issues.[809] We must consider the impact of our rules on the strength of media outlets, particularly those that are primary sources of local news and information, as well as on the number of independently owned outlets. As West Virginia Media, states, for example, maximizing the number of independent voices does not further diversity if those voices lack the resources to create and publish news and public information.[810]

361. *Common Ownership/Common Viewpoint.* As suggested by MOWG Study No. 2,[811] authored by David Pritchard, commonly-owned newspapers and broadcast stations do not necessarily speak with a single, monolithic voice.[812] Although limited in scope, the Pritchard study found that in half of the 10 newspaper-television combinations studied, the overall slant of the coverage of a company's television station was noticeably different from the overall slant[813] of the coverage provided by

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[808] Scripps Comments in MM Docket No. 01-235 at 2.

[809] *See* West Virginia Media Comments at 14-23; Bonneville Comments at 7; Cox Comments at 71-72; Dispatch Comments at 7-9; Stapleton Comments at 14-15.

[810] West Virginia Media Comments in MM Docket No. 01-235 at 13-15.

[811] MOWG Study No. 2.

[812] Fox Comments at 54-55; NAB Comments at 62-63. *See also* Fox Comments in MM Docket No. 01-235 at 20-23; Gannett Comments at 9-14; Morris Comments at 8-9; NAA Comments at 11-20; Tribune Comments in MM Docket No. 01-235 at 42-47. Indeed, few broadcast stations overtly editorialize.

[813] In MOWG Study No. 2, Pritchard defines the "slant" of a published or broadcast item about the presidential campaign from the point of view of a

the same company's newspaper in the same market. While this does not permit us to conclude that common ownership never results in common slant, it does suggest that common ownership "does not result in a predictable pattern of news coverage and commentary about important political events in ... commonly owned outlets."[814] The results of the Prichard study are consistent with other anecdotal information supplied by commenters.[815]

362. Several parties assert that ownership affects editorial decisions and, ultimately, viewpoints expressed by media outlets.[816] As evidence, CFA points to Kim Fridkin Kahn and Patrick J. Kenny's paper, *The Slant of the News: How Editorial Endorsements Influence Campaign Coverage and Citizens' View of Candidates*,[817] which concludes that information on news pages is slanted in favor of the candidate endorsed on the newspaper's editorial page. CFA argues that combined entities are more likely to engage in biased reporting that goes unchecked by a disinterested rival. Issues affecting TV stations but not newspapers, it claims, might be discussed differently by independent newspapers and newspaper/TV combinations. It

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hypothetical interested but undecided voter. If the coders judged an item to be likely to make such a voter more inclined to vote for a candidate, the item was coded as "favorable" to that candidate. "Slant" was not a judgment about whether a candidate or his staff would have been happy with publication or broadcast of the item, about whether an item was somehow biased, or about a journalist's intent. It was simply an assessment of whether an item would have made a typical undecided voter more likely to vote for a candidate.

[814] MOWG Study No. 2.

[815] *See* Tribune Comments in MM Docket No. 01-235 at 43; *see also* Gannett Comments in MM Docket No. 01-235 at 11-13; Gannett Comments at 9-14; NAB Comments at 62-63 (*citing e.g.*, Hicks and Featherston, Duplication of Newspaper Content at 551-53).

[816] *See* AFL-CIO Reply Comments in MM Docket No. 01-235 at 13-20; UCC Comments in MM Docket No. 01-235 at 11.

[817] 96(2) AMERICAN POLITICAL SCIENCE REVIEW (June 2002).

argues that, due to excessive influence and conflicts of interest, cross-owned media fail repeatedly to exercise their "watchdog" function, as documented by experiences in a variety of communities.[818] Some opponents of elimination of the rule, arguing that common ownership will result in the common expression of viewpoint, attack the motives and objectivity of Dr. David Pritchard, author of MOWG Study No. 2.[819] Dr. Dean Baker asserts that MOWG Study No. 2 has serious methodological flaws and that when the results are properly analyzed seven of the ten combinations had a common slant.[820] CFA argues that "this is a remarkably high bias and underscores the problem of common ownership across the media."[821] Other critics of MOWG Study No. 2 claim that its results cannot be generalized to all broadcast/newspaper combinations because the study examined only a small sample of cases and the author failed to include a "control" group of independently-owned broadcast stations and newspapers for comparison.[822]

363. Various parties submit anecdotal evidence purporting to show that ownership either does or does not influence viewpoint. For example, in an effort to show that ownership does influence viewpoint, AFL-CIO reports that Pulitzer winner Sydney Schanberg's column in *The New York Times* was canceled when he criticized the press for ignoring a major real estate scandal in New York;[823] the publisher of Hearst's *San Francisco Examiner* allegedly promised to stem his paper's criticism of Mayor Willie Brown if the mayor did not oppose

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[818] CFA Comments at 225-34.

[819] *See, e.g.*, AFL-CIO Comments at 36-43; AFTRA Comments at 28-32; CFA Comments at 221-24; CWA Comments at 29-34.

[820] AFL-CIO Comments, *Democracy Unhinged* at 5-7.

[821] CFA Comments at 47-48 n.68.

[822] *See, e.g., Democracy Unhinged.*

[823] AFL-CIO Comments at 22 (citing Northwest Passage Productions in association with KTEH, *Fear and Favor in the Newsroom*).

Hearst's takeover of its rival, the *Chronicle*;[824] and the *Los Angeles Times* failed to report a controversial real estate and recreational project that benefited the *Times'* parent, *Times-Mirror*, although the story was reported by other papers, including *The New York Times* and *The Bakersfield Californian*.[825] CWA argues that ownership influences viewpoint, and even reduces viewpoint diversity.[826] The record also includes anecdotes to the contrary, and those supplying these anecdotes are equally adamant that ownership does not influence viewpoint. For example, Tribune states that all of its newspapers did not endorse the same candidate in the 2000 presidential election.[827]

364. Suffice to say, although there is evidence to suggest that ownership influences viewpoint, the degree to which it does so cannot be established with any certitude. In order to sustain a blanket prohibition on cross-ownership, we would need, among other things, a high degree of confidence that cross-owned properties were likely to demonstrate uniform bias. The record does not support such a conclusion. Indeed, as the market becomes more fragmented and competitive, media owners face increasing pressure to differentiate their products, including by means of differing viewpoints. While such differentiation may occur, however, our analysis does not turn on that premise, and it is not determinative of our decision

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[824] *Id.* (citing Thomas Kunkel and Gene Roberts, *Leaving Readers Behind: The Age of Corporate Newspapering*, 23(4) AM J R 36 (May 1, 2001).

[825] *Id.* (citing Ben Bagdikian, THE MEDIA MONOPOLY (6th ed.) (Boston: Beacon Press 2000) at 39-41).

[826] CWA Comments at 29-40 (citing Marion Just and Rosalind Levine, *"News for Sale." Special Report: Local TV News*, COL J. REV./PEJ (Nov./Dec. 2001) at 2-3; DeNeen L. Brown, *Canadian Publisher Raises Hackles: Family is Accused of Trying to Restrict Local Newspapers' Autonomy*, WASHINGTON POST (Jan. 27, 2002) at A25); *see also* CFA Comments at 34-40, 225-34.

[827] Tribune Comments in MM Docket No. 01-235 at 43. *See also* Gannett Comments in MM Docket No. 01-235 at 11-13; Gannett Comments at 9-14.

with respect to our current newspaper/broadcast cross-ownership rule. Our analysis turns, rather, on the availability of other news and informational outlets. Thus, while we do not dispute that a particular outlet may betray some bias, particularly in matters that may affect the private or pecuniary interest of its corporate parent (*e.g.*, such as when an outlet has an interest in a real estate transaction or is being criticized in an op-ed), such anecdotes do not show a pattern of bias in the vast majority of news comment and coverage where such self-interest is not implicated. Nor, moreover, do such incidents mean that the public was left uninformed about the situation by other available media. Therefore, it would seem that the remedy for any such "bias" is the provision of antagonistic viewpoint we seek to advance.

365. *Available Media.* The record in this proceeding provides ample evidence that competing media outlets abound in markets of all sizes – each providing a platform for civic discourse.[828] Television and radio stations, both commercial and noncommercial, are important media for news, information, entertainment, and political speech.[829] Cable television systems, which originated as passive conduits of broadcast programming, have expanded to carry national satellite-

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[828] *See* Media Marketplace Section IV, *supra; see also* MOWG Study No. 1; MOWG Study No. 3 at 3, 18; MOWG Study No. 8 at Table 1; Appendix D; Gannett Comments at 9-14 (consumers use a variety of media to obtain news and information).

[829] Gannett Comments at 10-11. *See also* Andrea M.L. Perrella, THE POLITICAL INFLUENCE OF TALK RADIO (Université de Montréal, 1995) ("Talk radio has grown . . . from a fringe radio format to a lucrative industry and a noticeable actor in recent American politics. Talk radio has played a vocal role during the 1992 presidential election and the 1994 mid-term elections, with many people both in and out of politics attributing the Republican Party's 1994 election sweep to buoyant conservative talk-radio hosts."); Amy Ridenour, *President of The National Center for Public Policy Research*, Press Release (Nov. 20, 2002) ("Talk radio is America's town hall"). *But see* Consumers Union/MAP Reply Comments at 21-23 (claiming that radio stations are no longer a major voice in civic discourse).

delivered networks. Many also carry local public, educational, and governmental channels. Cable systems in larger markets are now evolving into platforms for original local news and public affairs programming.[830] Daily newspapers, while declining in number, continue to provide an important outlet for local and national news and expression.[831] The Internet, too, is becoming a commonly-used source for news, commentary, community affairs, and national/international information.[832] Seventy-two percent of Americans are now online and spend an average of nine hours weekly on the Internet.[833] MOWG Study No. 3 suggests that consumers generally view Internet news sources as a substitute for daily newspapers and broadcast news.[834] We cannot but conclude that, notwithstanding the claims of supporters of retention of the newspaper/broadcast rule,[835] the Internet does play an important role in the available media mix.[836]

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[830] The first local/regional cable news channels began in the mid-1980s; today there are 32 cable news channels. *See* NCTA, *Regional Cable Networks*, Cable Developments (2002) at 171-94.

[831] CFA Comments at 159-62.

[832] *See, e.g.*, Media General Reply Comments in MM Docket No. 01-235 at 8-11 (Internet a surrogate for local newspapers with over half of the nation having access to the Internet) (citing, NTIA, *A Nation Online: How Americans are Expanding Their Use of the Internet* (Feb. 2002)); *see also* NAB Reply Comments in MM Docket No. 01-235 at 8-10; Hearst Comments in MM Docket No. 01-235 at 10-11.

[833] *See, e.g.*, Hearst Comments in MM Docket No. 01-235 at 10-11.

[834] *See* MOWG Study No. 3. We recognize, however, that many television stations and newspapers also distribute their content via the Internet.

[835] UCC Comments in MM Docket No. 01-235 at 17-19, Att. 10 (Internet not effective news or advertising substitute for broadcast stations or daily newspapers); CU Comments in MM Docket No. 01-235 at 65-96 (diversity not assured by competition across media products); AFL-CIO Comments at 34-36 (arguing that more than 60% of Americans watch broadcast news, and about 62 percent of Americans read a daily newspaper, while other media do not have comparable reach, and half of all Americans do not have Internet connections at home); CWA Comments at 5-9, *citing* MOWG Studies Nos.

366. We disagree with parties that assert that there is little diversity in media markets.[837] The average American has a far richer and more varied range of media voices from which to choose today than at any time in history. Given the growth in available media outlets, the influence of any single viewpoint source is sharply attenuated. AFL-CIO argues to the contrary, asserting that the growth rate of media outlets is slowing.[838] The slowing of the growth rate is attributable, at least in part however, to the lack of available spectrum to maintain the tremendous growth in broadcast outlets recently experienced. CFA argues that only a large number of independent owners – "diverse and antagonistic sources" – will provide sufficiently diverse viewpoints for effective public discourse.[839] It estimates that elimination of the rule would result in approximately 200 newspapers merging with broadcasters, reducing the number of independent outlets available.[840] This, some commenters allege, will cause a reduction in viewpoint diversity.[841] We agree that diversity of ownership can promote a diversity of viewpoints and recognize that absent the current

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3 and 8 (Internet not a mass medium and most people use Internet news sites for non-local news).

[836] Major media providers need no convincing, as virtually all of them have rushed to create webpages in an effort to capture a segment of this incipient market. For example, MSNBC, Fox News, CNN, the major broadcast television networks and many newspapers all now maintain websites.

[837] *See, e.g.*, AFL-CIO Reply Comments in MM Docket No. 01-235 at 11-12; UCC Comments in MM Docket No. 01-235 at 2-8, Attachments 2, 3 (purporting to show that local broadcast media have become less diverse and more concentrated between 1993 and 2001); UCC Reply Comments in MM Docket No. 01-235 at 24-26, Attachments.

[838] AFL-CIO Comments at 1-3.

[839] CFA Comments at 283.

[840] *Id.* at 244-46.

[841] *See, e.g.*, AFL-CIO Comments at 36-43; AFTRA Comments at 28-32; CFA Comments at 221-24; CWA Comments at 29-40 (citing, *e.g.*, Brown, *supra* note 829.

rule there will be some consolidation. We conclude, however, that our new local rules will protect the diversity of voices essential to achieving our policy objectives. A blanket prohibition on newspaper-broadcast combinations, however, can no longer be sustained.

367. In short, the magnitude of the growth in local media voices shows that there will be a plethora of voices in most or all markets absent the rule. Indeed, the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans.[842] Our rules should account for these changes and promote, rather than inhibit, the ability of media outlets to survive and thrive in this evolving media landscape.[843] They must "give recognition to the changes which have taken place and to see to it that [they] adequately reflect the situation as it is, not was."[844]

d. Conclusion

368. As discussed above, we find that a newspaper-broadcast combination cannot adversely affect competition in any relevant product market and, thus, we cannot conclude that the current newspaper-broadcast cross-ownership rule is necessary to promote competition. Similarly, we conclude that the evidence in the record of this proceeding demonstrates that combinations can promote the public interest by producing more and better overall local news coverage and that the current rule is thus not necessary to promote our localism goal. Instead, we find that it, in fact, is likely to hinder its

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[842] Tribune Comments in MM Docket No. 01-235 at 36-38.

[843] *See, e.g.*, S. Rep. No. 104-23, 104th Cong., 1st Sess. at 64 (1995) (statement of Sen. Burns) (the industry is "now operating under archaic rules that are better suited the 1950s than the 1990s").

[844] *1975 Multiple Ownership Second Report and Order*, 50 F.C.C.2d at 1075.

attainment. Finally, the record does not contain data or other information demonstrating that common ownership of broadcast stations and daily newspapers in the same community poses a widespread threat to diversity of viewpoint or programming.[845]

369. As outlined above, the types of media and the number of outlets within each media, except daily newspapers, have increased dramatically in the past twenty years. In addition, evidence shows that the link between common ownership of newspapers and broadcast outlets and common viewpoint is tenuous, ill-defined, and difficult to measure. In any event, we do not think that the current rule is necessary to preserve diversity of viewpoint. The local cross-media limits adopted herein are more precisely targeted at specific types of markets in which particular combinations are most likely to harm diversity. We conclude, therefore, that the current rule is no longer necessary in the public interest.[846]

2. Radio/Television Cross-Ownership Rule

370. The radio/television cross-ownership rule limits the number of commercial radio and television stations an entity may own in a local market. Currently, the rule allows a party to own up to two television stations (provided it is permitted under the television duopoly rule) and up to six radio stations

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[845] *See* CanWest Comments in MM Docket No. 01-235 at Appendix A (no structural link between the number of owners and the degree of diversity); NAB Comments in MM Docket No. 01-235 at 20-26 (citing David Haddock and Daniel Polsby, *Bright Lines, the Federal Communications Commission's Duopoly Rule and the Diversity of Voices*, 42 FED COMM L. J. 331 (1990); Benjamin Compaine, *The Impact of Ownership on Content: Does It Matter?*, 13 CARDOZO ARTS & ENT. L. J. 755 (1995)).

[846] On March 11, 2003, Media General, Inc., filed a "Motion to Bifurcate and Repeal." That Motion asked the Commission to break the newspaper/broadcast cross-ownership rule out of the biennial review, and repeal the rule, if it could not act in the biennial review in the spring of 2003. Because we are acting in the biennial review in the spring of 2003 and are repealing the subject rule, we dismiss Media General's Motion as moot.

(to the extent permitted under the local radio ownership rule) in a market where at least 20 independently owned media voices[847] would remain post-merger. Where parties may own a combination of two television stations and six radio stations, the rule allows a party alternatively to own one television station and seven radio stations. A party may own up to two television stations (as permitted under the current television duopoly rule) and up to four radio stations (as permitted under the local radio ownership rule) in markets where, post-merger, at least ten independently owned media voices would remain. A combination of one television station and one radio station is allowed regardless of the number of voices remaining in the market.[848]

371. Based on the record in this proceeding, we do not find that the radio/television cross-ownership rule remains necessary in the public interest to ensure competition, diversity or localism. Our decision reflects the substantial growth and availability of media outlets in local markets, as well as the potential for significant efficiencies and public interest benefits to be realized through joint ownership. We find that our diversity and competition goals will be adequately protected by the local ownership rules adopted herein.

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[847] Media voices include (1) independently owned and operating full-power broadcast television stations within the DMA of the television station's community of license that have Grade B signal contours that overlap with the Grade B signal contour of the television station at issue; (2) independently owned and operating broadcast radio stations that are in the radio metro market of the television station's community of license or the radio station's community of license; (3) independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron; (4) English-language newspapers that are published at least four days a week within the television station's DMA and that have a circulation exceeding 5 percent of the households in the DMA; and (5) one cable system, if cable television is generally available to households in the DMA. Cable television counts as only one voice in the DMA, regardless of how many individual cable systems operate in the DMA. 47 C.F.R. § 73.3555(c)(3).

[848] 47 C.F. R. § 73.3555(c).

372. *Background.* In 1970, the Commission restricted the combined ownership of radio and television stations in local markets.[849] The purpose of the rule (originally referred to as the one-to-a-market rule) was twofold: (1) to foster maximum competition in broadcasting, and (2) to promote diversification of programming sources and viewpoints.[850] In 1995, the Commission requested comment to determine whether the cross-ownership limitations were still warranted in light of the then current market conditions.[851] Before the Commission issued a decision, Congress passed the 1996 Act.[852] Section 202(d) of the 1996 Act required the Commission to extend the radio-television cross-ownership presumptive waiver policy to the top 50 television markets "consistent with the public interest, convenience and necessity." Prior to implementing the statutory change, we issued a *Second Further Notice* requesting comment on whether modification of the rule was warranted beyond the Section 202(d) requirements.[853] We asked whether, instead of just extending the waiver policy to the top 50 markets, we should eliminate the rule in its entirety based on a finding that radio and television do not compete in the same market. We also asked whether television and radio

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[849] Originally, the rule prohibited the common ownership of commercial radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompassed the entire community of license of a television station or, if the Grade A contour of a television station encompassed the entire community of license of an AM or FM station. *Amendment of Section 73.35, 73.340 and 73.630 of the Commission's Rule Relating to Multiple Ownership of Standard, FM and TV Broadcast Stations*, 22 F.C.C.2d 306, 308 ¶ 8 (1970) ("*1970 Multiple Ownership First Report and Order*").

[850] *Id.* at 307 ¶ 3.

[851] *TV Ownership FNPRM*, *supra*.

[852] *See* note 1, *supra*.

[853] *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, 11 FCC Rcd 21655, 21682-89 ¶¶ 59-89 (1996) ("*TV Second FNPRM*").

stations should be considered competitors, and if the radio/television cross-ownership rule could be eliminated because the respective radio and television ownership rules alone sufficed to ensure sufficient diversity and competition in the local market.[854] In the event we found that the cross-ownership rule was necessary, we sought comment on specific options for modification of the rule.[855]

373. In 1999, the Commission modified the rule to its current form.[856] We found that the growth of media outlets and cable systems, the efficiencies of joint ownership, and the public service benefits obtained from joint operations all supported our decision to allow additional common ownership of radio and television stations.[857] Although we decided not to eliminate the rule, we stated that we would continue to monitor the impact of the broadcast ownership rules on the industry and that we would further consider relaxation of the radio/television cross-ownership rule in future biennial reviews.[858] In June 2000, we released the *1998 Biennial Report*, where we concluded that further relaxation of the broadcast ownership rules was not then warranted.[859] In light of the 1999 relaxation of the broadcast ownership rules, we decided to proceed cautiously and monitor the impact of the new rules on diversity and competition.[860]

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[854] *Id.* at 21684 ¶ 63.

[855] *Id.* at 21685-87 ¶¶ 65-71.

[856] *Local TV Ownership Report and Order*, *supra* note 96. Also in the Local TV Ownership Report and Order we eliminated the five factor case-by-case waiver standard. Currently, waivers are granted only in situations involving a "failed station" or other extraordinary circumstances.

[857] *Id.* at 12948 ¶ 102.

[858] *Id.* at 12949 ¶ 106.

[859] *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 26.

[860] In the 2000 Biennial Review proceeding, the Commission did not alter the recommendations it had made in the 1998 Biennial Review proceeding with respect to the radio/television cross-ownership rules. *See 2000 Biennial*

374. Under our statutory mandate pursuant to Section 202(h) of the 1996 Act, we are required to consider biennially whether "to 'repeal or modify' any rule that is not 'necessary in the public interest.'"[861] In determining whether the rule meets this standard, we consider whether it is necessary to promote any of our public interest objectives.[862] With respect to cross-ownership of radio and television stations in the same market, we reexamine the impact of the rule on competition, localism and diversity.

a. Competition

375. *The Product Market.* To assess the competitive impact of our radio/television cross-ownership rule, we need to determine whether radio and television stations compete for sources of revenue generation – in this case, advertising.[863] If we find that they do, *i.e.*, that a significant number of advertisers consider radio and television to be good substitutes,

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Regulatory Review, *supra*, note 512.

[861] *Fox Television*, 280 F.3d at 1042.

[862] *Id.*

[863] The competitive analysis for both the local radio and the local television ownership rules focuses on two additional markets, delivered programming and programming production. However, in analyzing the effects of combined ownership of radio and television stations in a local market, neither of the latter product markets is relevant. Radio and television broadcasting are distinct programming markets with little overlap. The bulk of video entertainment and news programming available on commercial television is not suitable for radio. Similarly, audio radio programming, which is predominately music and talk show formats, cannot be replicated on television. Thus, because the essential nature of each medium determines the type of programming each medium broadcasts, the content is not interchangeable. Authors Lin and Jeffres used media websites to analyze the programming of newspapers, radio stations, and television stations in 25 of the largest metro markets in the US. They concluded that each medium has a relatively distinctive content emphasis. *See* Carolyn A. Lin and Leo W. Jeffres, *Comparing Distinctions and Similarities across Websites of Newspapers, Radio Stations, and Television Stations*, J MASS COMM Q (Columbia; Autumn 2001) at 555-573.

then our concern would be that elimination or relaxation of the cross-ownership restrictions may enable a single firm to acquire sufficient market power to hinder small and independent broadcasters' efforts to generate revenue, and thereby put their continued viability at risk. However, if radio and television are not in the same product market, then we would have little concern that elimination or relaxation of the rule would have any negative effects on competition. Broadcasters compete with each other for audience share by offering quality programming of interest to local communities. Higher audience shares, in turn, attract advertisers, and thus, enable radio and television stations to generate revenue. Our continuing goal is to ensure that our rules and policies foster, rather than hinder, broadcasters' incentives and ability to compete for advertising revenues by providing consumers with innovative and quality programming, news, and information.

376. In the *Notice* we asked commenters to provide us with evidence regarding the degree to which radio serves as an economic substitute for broadcast television.[864] We noted that evidence showing radio and television are not economic substitutes would support relaxation or elimination of the current rule. The *DOJ/FTC Guidelines*[865] define the relevant product market as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a "small but significant and non-transitory price increase," presuming no change in the terms of sale of other products.[866] Thus, when one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market even though the products themselves are not identical.[867] In the *Local Radio*

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[864] *Notice*, 17 FCC Rcd at 18537 ¶ 104.

[865] *DOJ/FTC Guidelines*, *supra* note 285.

[866] *Id.* § 1.11.

[867] *Id.* § 1.12. *See, e.g., EchoStar/DirecTV HDO*, 17 FCC Rcd at 20605-06 ¶ 106.

Ownership NPRM, we noted that the Department of Justice views radio as a discrete market, "finding that advertisers find value in certain of radio's unique attributes."[868]

377. As described in greater detail above, we conclude that most advertisers do not consider radio and television stations to be good substitutes for advertising and, therefore, that generally combinations of these two types of media outlets likely would not result in competitive harm.[869] Again, in MOWG Study No. 10, Anthony Bush found weak substitutability between local media, including radio and television. In separately filed comments, both Professor Jerry Hausman and Dr. Bruce M. Owen criticize Bush for using national and regional, rather than local, advertising price data.[870] As we noted above, we recognize the limitations of the SQAD data but believe the effects of these measurement errors may cancel out such that

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[868] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19879 ¶ 42.

[869] CWA agrees that newspapers, television and radio are distinct and separate media product markets, with weak substitution by consumers and advertisers. CWA also urges the Commission to adopt structural rules that place ownership limits on each distinct media type. See CWA Comments at 2-3, 46. In rare instances, advertisers may consider radio and television to be good substitutes. Buckley, for example, states that competition between radio and television advertising exists in smaller markets, such as in the Monterey-Salinas market, where radio and television advertising rates are approximately the same during certain times of the day. *See* Buckley Comments at 3. The local television ownership rule and the local radio ownership rule will prevent any one entity from owning all of the broadcast television stations or all the broadcast radio stations in a local market. Thus, those advertisers that consider radio and broadcast stations to be good substitutes, and play these media against one another to negotiate a good price, would continue to have access to these separately owned broadcast stations.

[870] *See* Clear Channel Comments in MM Docket No. 01-317 at 20-22, Exh. 6 at 5-8; Fox Comments, Owen Statement; *see also* NAB Comments in MM Docket No. 01-317 at 30-33. These comments were submitted in the local radio proceeding, and do not discuss the relevant product market for the radio/television cross-ownership rule.

the estimates of Bush are unbiased. We weight the study accordingly and consider the other evidence on the record.

378. Moreover, other studies confirm Bush's conclusion that advertisers do not consider radio and television to be good substitutes. Silk, Klein, and Berndt (2002) examine advertising in the national markets for eight different media outlets: magazines, newspapers, network television, spot television, network radio, spot radio, outdoor billboards, and direct mail.[871] The authors find that for advertisers in national markets, radio and television are weak substitutes. Reid and King (2000) used survey and interview methods to examine advertising managers' opinions of media substitutability.[872] Their reports suggest that managers consider radio and broadcast television to be weak substitutes.

379. In addition to the empirical evidence, differences between radio and television programming and formats suggest that they do not compete in the same product market. First, in any given market, radio stations can market and distinguish themselves to potential listeners through their identification with a particular format.[873] These formats allow radio advertisers to target specific demographics much more precisely than they can when they advertise on television. In addition, viewers and listeners experience these two mediums differently. Television uses both sight and sound to allow advertisers to reach their audience in a relatively comprehensive way. As an audio medium, radio is more limited. As a result, radio and television broadcast distinct programming. Video is not suitable for radio and vice versa. The difference is important for viewers and advertisers alike.

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[871] Silk, Klein, and Berndt, *supra* note 522.

[872] Reid and King, *supra* note 523.

[873] Country, jazz, urban, pop, and rock are examples of these radio formats.

380. The essential nature of each medium determines, in large measure, the type of programming each will broadcast.[874] For example, a car dealership or furniture warehouse wishing to quickly create strong brand recognition will likely place greater value on television ads where potential customers see the products, as opposed to using radio ads. Radio listeners are seldom completely engaged to listening because simultaneously they are perhaps, driving, working, cleaning, dining, or shopping. Thus, some advertisers may prefer, while others avoid, the radio listener as a significant audience to target. Additionally, television advertisements typically are more expensive than radio ads, suggesting that advertisers could not easily switch between the two mediums. Recent data suggest that an average 30 second evening television spot costs approximately $19 per thousand viewers, while on radio, the same spot costs approximately $11.[875] Radio stations typically do not garner the size audiences that television stations do, thus, making the 30 second television spot considerably more expensive than a radio spot. Small-scale, local establishments likely will find radio to be more affordable.

381. In sum, television and radio stations neither compete in the same product market nor do they bear any vertical relation to one another.[876] A television-radio combination, therefore, cannot adversely affect competition in any relevant product market. Accordingly, we cannot conclude that the current

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[874] MOWG Study No. 3 studies a number of different specifications for consumers of TV and radio and finds either weak or no substitution between these two media.

[875] Data represent average cost per thousand viewers or listeners during prime time for third quarter, 2002. Source of data is SQAD. For explanation of SQAD data see note 736, *supra*.

[876] Generally we identify both the product and the geographic markets. Because we find that radio and television advertising are separate product markets, it is not necessary to define the geographic market for these purposes.

television-radio cross-ownership rule is necessary to promote competition.

b. Localism

382. In the *Notice*, we sought comment on how cross-ownership limitations affect localism, as measured by the quantity and quality of news and public affairs programming that stations provide to local communities.[877] We sought comment on the quantities of local news and public affairs programming provided by radio and television combinations as opposed to stand-alone stations in the same markets. We asked whether radio and television combinations produce more, less, or the same amount of news programming than stand-alone stations. We also asked commenters to address the implications of any such differences. We find that by prohibiting combinations of news gathering resources between radio and television stations, the current rule prohibits owners from maximizing local news and information production, which would benefit consumers.

383. There is no compelling or substantial evidence in the record that the rule is necessary to protect localism. The record in this proceeding, in fact, includes evidence to the contrary – that efficiencies and cost savings realized from joint ownership may allow radio and television stations to offer more news reporting generally, and more local news reporting specifically, than otherwise may be possible. The record in this proceeding suggests that station owners will use additional revenue and resource savings from television-radio combinations to provide new and innovative programming, provide more in-depth local interest programming, and provide better service to the public, including locally oriented services.[878] As discussed in the

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[877] *Notice*, 17 FCC Rcd at 18537 ¶ 103.

[878] Duhamel Comments at 1, 6; *see generally*, Clear Channel Comments in MM Docket No. 01-317 at 23; Cumulus Comments in MM Docket No. 01-317 at 5-6; Viacom Comments in MM Docket No. 01-317 at 62-64; NAB Comments in MM Docket No. 01-317 at 43-45.

Diversity Index section, consumers rely on both radio and television for coverage of news and public affairs.[879] Therefore, consumers will benefit from a policy which allows radio and television owners to maximize these offerings.

384. Some commenters assert that independent owners expend more resources to air local programming or produce more news and public affairs programming than do owners of combined stations.[880] Further, some commenters contend that cross-ownership of radio and television stations in local markets leads to reduced independent news and public affairs programming, more syndicated programming,[881] reductions of staff, cross-assigned journalists, re-use and re-purposing of content, and increased amounts of on-air advertising time.[882]

385. These parties have failed to show that the rule remains necessary in the public interest. First, isolated anecdotes of changes in news programming schedules following a

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[879] MOWG Study No. 8; *see also* Diversity Index, Section VI(C)(3), *infra*.

[880] UCC Comments at 40-41. UCC points to Clear Channel's 2002 acquisition of the Ackerley Group, in which Clear Channel acquired 16 television stations, and created new radio and television combinations in eleven communities. Post-merger, UCC argues that in Watertown, New York, Clear Channel replaced the television station's morning, noon and weekend news broadcasts with a morning news show produced in Birmingham. UCC also complains that Clear Channel replaced its local news telecasts on stations in Binghampton and Utica with regional news programs. However, without additional information, it is impossible to evaluate the actual reasons for the programming changes or effect of the changes on the aggregate news programming produced and distributed by the Clear Channel stations in the market.

[881] AFTRA Comments in MM Docket No. 01-317 at 12. AFTRA believes that syndicated programming does not serve the interests of local communities. *See also* AFTRA Comments at 12-15 regarding the sharing of news product between different local outlets.

[882] *Id.* at 5-8. AFTRA cites CBS/Infinity's acquisition of Group W/Westinghouse, which resulted in the cross-ownership of television and radio stations in the Chicago market. AFTRA states that CBS proposes to cross-assign news reporters for television and its seven radio stations.

transaction do not provide the kind of systematic empirical evidence necessary to support a general allegation that cross-owned stations produce lesser quantities of news, or news of lower quality, than do non-cross-owned stations. Second, shared support staff and conservation of resources does not necessarily mean a reduction in local news. The efficiencies derived from some of these practices may in fact, increase the amount of diverse, competitive news and local information available to the public.[883] Thus, the record does not demonstrate that the current rule specifically promotes localism, or that elimination of the rule would harm it.

c. Diversity

386. We asked in the *Notice* whether the cross-ownership rule is necessary to foster viewpoint diversity in today's media marketplace.[884] We sought comment on the types of media that contribute to viewpoint diversity and how the cross-ownership rule affects viewpoint diversity.[885] We noted that the current rule counts as a media voice commercial and non-commercial broadcast television and radio stations, certain daily newspapers, and cable systems. We asked whether additional types of media should also be counted as contributing to viewpoint diversity, such as the Internet, DBS, cable overbuilders, individual cable networks, magazines, and weekly newspapers.

387. As discussed above, in today's media market there are more media outlets than ever before.[886] The Commission has previously concluded that "the information market relevant to

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[883] We received substantially more comments on this issue in the context of the newspaper/broadcast cross-ownership rule. There, the record suggests that the newspaper/broadcast cross-ownership rule impedes efficiencies that might otherwise benefit the public. We believe that the same is true in the context of radio and television combinations.

[884] *Notice*, 17 FCC Rcd at 18536 ¶ 100.

[885] *Id.* at 18536-37 ¶ 102.

[886] *See* Media Marketplace, Section IV, *supra*.

diversity includes not only television and radio outlets, but cable, other video media and numerous print media as well."[887] Not only have we seen an increase in the types of outlets available, but local markets have also experienced enormous growth in broadcast outlets. The record shows that in local broadcast markets of all sizes the numbers of radio and television stations have increased over the years.[888]

388. We conclude that the current television/radio cross-ownership rule is not necessary to ensure viewpoint diversity. As CanWest explains, we should not view specific markets in a vacuum for diversity purposes, but rather should consider that households get information from many sources.[889] Thus, we agree with the commenters that argue that a cross-ownership rule applicable only to radio and television is "inequitable and outdated."[890] Although several commenters argue that retention of the radio/television cross-ownership rule is necessary to protect the availability of diverse views, information, and local programming,[891] we believe that a rule limited to just radio and television fails to take into account all of the other relevant media in local markets available to consumers.

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[887] *See 1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 25; *See* Viacom's Petition for Rulemaking (May 23, 2002) at 7; Clear Channel Comments at 5; NAB Comments at 68; Fox Comments at 58.

[888] *See* Media Marketplace, Section IV, *supra*; MOWG Study No. 1.

[889] CanWest Comments at 3. CanWest notes that cross-ownership in Canada has strengthened media companies and has encouraged greater diversity and more sources of information. *Id.* at 6.

[890] *See, e.g.*, NAB Comments at 69-70.

[891] Desmond Reply Comments at 7; AFTRA Comments at 10-11; CWA Comments at 2-3, 46; Nancy Stapleton Comments at 10-11, 16; *see also* Children Now Comments at 3-4 (if the Commission relaxes the cross-ownership rule, it should analyze the impact of proposed media mergers on children).

389. We agree with the commenters, however, that fostering the availability of diverse viewpoints remains an important policy goal, and that diversity of ownership promotes diversity of viewpoints. We are adopting modified service-specific local ownership rules that will protect and promote competition in the local television and radio markets and, as a result, will also protect and preserve viewpoint diversity within those services. In addition, we are adopting a new cross-media limit rule, described below, that is specifically designed to protect diversity of viewpoint in those markets in which we believe consolidation of media ownership could jeopardize such diversity. The local rules we are adopting in this *Order* are designed to reflect the substantial growth and availability of media outlets in local markets, and to account for concentration among all media outlets that substantially contribute to the dissemination of diverse and antagonistic viewpoints in local markets.[892] These rules make a rule directed only at radio and television unnecessary and anachronistic.

d. Conclusion

390. We do not have evidence in the record sufficient to support retention of the current radio/television cross-ownership rule. From a competitive perspective, radio and television are not good substitutes for the same revenue producing opportunities, and thus, cannot be regarded as

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[892] MOWG Study No. 8 shows that consumers use a wide variety of media to obtain entertainment, news and information, and that the general public views all of these sources as substitutes. MOWG Study No. 3 shows consumers' increased use of the Internet at work and at home. Internet use has increased from 15% in 1997 to 46% in 2000. *Id.* at Table 7. The UCLA Internet Report suggests that over the past three years a significant number of Internet users have been substituting away from television, getting more news and entertainment online. "The UCLA Internet Report: Surveying the Digital Future, Year Three," UCLA Center for Communication Policy (Feb. 2003) at 33. *See also* CanWest Comments at 6; CST Comments at 5-7; Paxson Comments at 34-35. No commenters argue that a diversity analysis should be limited strictly to radio and television programming.

competing in the same product market. There is little evidence that the current rule promotes localism and, to the contrary, the record indicates that combined station groups may be able to achieve cost savings that may accrue to the benefit of listeners and viewers. Finally, radio and television stations compete with many other electronic and print media in providing programming and information to the public, and the targeted cross-media limits adopted herein are therefore better designed to achieve our diversity goal in markets where diversity could be jeopardized by cross-ownership than the stand-alone radio/television cross-ownership rule. In addition, our local television and local radio ownership rules, which are designed to preserve competition in those markets, will also foster diversity of voices. We turn next to a discussion of the Diversity Index, which is intended to help us analyze outlets that contribute to viewpoint diversity in local markets.

3. The Diversity Index[893]

391. In order to provide our media ownership framework with an empirical footing, we have developed a method for analyzing and measuring the availability of outlets that contribute to viewpoint diversity in local media markets. The measure we are using, the Diversity Index or DI, accounts for certain, but not all media outlets (newspapers, broadcast, television, radio, and the Internet) in local markets available to consumers, the relative importance of these media as a source of local news, and ownership concentration across these media. The DI builds on our previous approach to the diversity goal: We retain the principle that structural regulation is an appropriate and effective alternative to direct content regulation; we retain the principle that viewpoint diversity is fostered when there are multiple independently-owned media outlets in a market; we retain our emphasis on the

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[893] The Commission wishes to recognize some of its economists for their efforts in developing this index including: Thomas Spavins, Enforcement Bureau, Judith Herman, Media Bureau, and John Scott, Media Bureau.

citizen/viewer/listener and on ensuring that viewpoint proponents have opportunities to reach the citizen/viewer/listener. What we add is a method, based on citizen/viewer/listener behavior, of characterizing the structure of the "market" for viewpoint diversity. We use the DI as a tool to inform our judgments about the need for ownership limits. This section explains the rationale for the diversity index and discusses calculation methodology. The DI is based partly on the results of a consumer survey, which we acknowledge is not without flaws, and partly on our expert judgment and analysis of the local viewpoint diversity marketplace. While the Diversity Index is not perfect, nor absolutely precise, it is certainly a useful tool to inform our judgment and decision-making. It provides us with guidance, informing us about the marketplace and giving us a sense of relative weights of different media. It informs, but does not replace, our judgment in establishing rules of general applicability that determine where we should draw lines between diverse and concentrated markets.

392. Because of the limitations in the Nielsen survey, and the specific assumptions underlying the DI, it is a useful tool only in the aggregate. It cannot, and will not, be applied by the Commission to measure diversity in specific markets. Indeed, it could not be used on a particularized basis to review the diversity available in a specific market. For example, in determining the appropriate weights to apply to the various media, we have decided to give no weight to cable television or magazines as sources of local news, notwithstanding the results in the Nielsen survey to the contrary.[894] We recognize that consumers in certain markets do have access to local news from local magazines, local cable news channels, and PEG channels, but we believe that the Nielsen survey overstates this influence. On a national basis, we believe most consumers either do not

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[894] *See* our discussion excluding magazines and cable television in subsection, Choice of Media, Section VI(C)(3)(b), *infra*.

have access to such sources (such as a local news magazine) or rely very little on them (such as PEG channels). Similarly, the DI assumes each town has only one weekly newspaper. In the aggregate, the DI reflects the market situation of most communities. In sum, excluding these sources or factors from the DI does not undermine the general conclusions we reach about market concentration because the DI is not capable of capturing particularized market characteristics; it is intended to capture generalized, typical market structures and identify trends.

a. Rationale for the Diversity Index

393. As discussed above, fostering diversity is one of the principal goals of the Commission's media broadcast ownership rules. In the past, the Commission has described its diversity goal as fostering "competition in the marketplace of ideas." Although the analogy between economic competition and diversity is not perfect, it is of use in structuring our approach. Viewpoint diversity refers to availability of a wide range of information and political perspectives on important issues. Information and political viewpoints are crucial inputs that help citizens discharge the obligations of citizenship in a democracy. We recognize that the number of political viewpoints or the number of perspectives on a particular issue may be greater than the number of media outlets in a market. And we recognize that, in n effort to cater to viewer/listener/reader preferences any single outlet may choose to present multiple viewpoints on an issue. However, we do not expect every outlet to present every perspective on every issue. The competition analogy suggests that having multiple independent decision-makers (i.e., owners of media outlets) ensures that a wide range of viewpoints will be made available in the marketplace.

394. News and public affairs programming is the clearest example of programming that can provide viewpoint diversity. As discussed above, we regard viewpoint diversity to be at the

core of our public interest responsibility, and recognize that it is a product that can be delivered by multiple media. Hence, in contrast to our competition-based rules, diversity issues require cross-media analysis.[895] Because what ultimately matters here is the range of choices available to the public, we believe that the appropriate geographic market for viewpoint diversity is local, *i.e.*, people generally have access to only media available in their home market.[896] To assist in our analysis of existing media diversity, and to help us determine whether any cross-media restrictions are necessary in the public interest, we use a summary index that reflects the general or overall structure of the market for diverse viewpoints. By analogy with competition analysis, the diversity index is inspired by the Herfindahl-Hirschmann Index (HHI) formulation, calculating the sum of squared market shares of relevant providers in each local market.

395. The measurement of market concentration has a long history in economics and several different measures have been proposed in the economics literature.[897] For example, a simple count of the number of firms in an industry (as the Commission has previously done in the media industry), the four-firm concentration ratio (measuring the percentage of the market held by the top four companies), and the HHI have all been ascendant at various times. The HHI measure, however, is particularly attractive for two reasons.

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[895] See the discussion of the local radio and local television rules, Section VI(A) and (B), wherein we conclude that radio and television advertising markets are separate and that consumers of programming do not see radio and television as close substitutes.

[896] *See 1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 24-25 ¶ 24; *Notice*, 17 FCC Rcd at 18546 ¶ 136.

[897] For an overview of this literature *see, e.g.*, Jean Tirole, THEORY OF INDUSTRIAL ORG. (MIT Press 1993) at 221-23; Michael Waterson, ECONOMIC THEORY OF THE INDUSTRY (Cambridge Univ. Press 1984) at 166-74.

396. First, its mathematical properties correspond to our beliefs about the effects a merger would cause. Each possible measure of market concentration has benefits and weakness that can be captured by the list of mathematical properties, or axioms, that that particular measure satisfies.[898] In the case of measuring market concentration, a list of reasonable requirements or axioms limit us to the choice of few mathematical formulas.[899] Within this class of admissible indices, the HHI can be thought of as a very conservative choice in the following sense. If we ask "what is the loss of competition from a merger," known as the "delta" in the antitrust field, the HHI measure reflects the assumptions that: (i) an acquisition of a firm with given size will lead to a larger harm the larger the acquiring firm, and (ii) this harm is proportional to the size of both the merging parties. Applying a similar analysis to the Diversity Index, the Index reflects the assumptions that if newspapers have twice the diversity importance of television, a newspaper's acquisition of a broadcast television station will cause twice the loss of diversity as will a merger of two broadcast television stations. Conversely, if radio has less diversity weight than television, then a merger of a television and a radio station will cause less of a loss of diversity than will a merger of two television stations. In contrast, if the Commission were to adopt a simple "voice test," for example, then it would be assuming that the loss of voice due to a merger is independent of the diversity

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[898] A requirement placed on an index is known in mathematics as an axiom. When we can show that there is a unique mathematical function that satisfies a given list of axioms, then that function is said to be *characterized* by the list of axioms. For a classic exposition of the axiomatic approach *see* J. Aczel, LECTURES ON FUNCTIONAL EQUATIONS AND THEIR APPLICATIONS (Academic Press 1966).

[899] The axioms are presented in David Encaoua and Alexis Jacquemin , *Degree of Monopoly, Indices of Concentration and the Threat of Entry*, 21 INT'L ECON. REV. 87-105 (1980). Their list includes axioms such as, the value of an index should increase when two firms merge and decrease when a new firm enters.

importance of either party. Similarly, if the Commission were to adopt a concentration ratio measure, then it would implicitly be assuming that the loss of diversity is independent of the size of the larger firm in the transaction. It is in this sense -- that the size of the diversity loss increases as does the diversity importance of either merging party – that the Diversity Index developed here is a conservative measure, and one which we adopt in the interest of prudence.

397. Moreover, the HHI, from which our chosen measure derives, is widely used in economics and in antitrust. Thus, we can draw on our experience with the HHI in competition policy to determine threshold values for the Diversity Index. Indeed, the HHI formula is already widely used in the diversity literature for measuring content diversity.[900]

398. We assign market shares to these providers based in part on the results of responses to the Nielsen survey described in MOWG Study No. 8. The Diversity Index itself, however, is a blunt tool capable only of capturing and measuring large effects or trends in typical markets. Thus, the DI change from a particular transaction in a particular market might be more or less than we anticipate, or that it might result in a market DI higher or lower than that suggested by our examples. This is of no moment as the DI is a tool useful only in the aggregate and will not – and cannot in its current form - be applied on a particularized basis.

399. There are several conservative assumptions in our analysis of viewpoint concentration. First, we premise our analysis on people's actual usage patterns across media today. Fox reasonably argues that the Commission should set ownership limits based on the availability of news sources

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[900] The literature using the HHI to measure content diversity goes back to at least 1979. *See* Barry Litman, *The Television Networks, Competition and Program Diversity*, 23 J. OF B'CASTING 393-409 (1979).

irrespective of their particular usage rates by consumers.[901] The record contains evidence that most people can and do substitute among different media for news and information.[902] Nonetheless, our method for measuring viewpoint diversity weights outlets based on the way people actually use them rather than what is actually available as a local news source. We adopt this approach out of an abundance of caution because we are protecting our core policy objective of viewpoint diversity. Second, our diversity analysis is based on preserving viewpoint diversity among local, not national, news sources. The effect is that we exclude, for purposes of measuring viewpoint concentration, the large number of national news sources such as all-news cable channels and news sources on the Internet and instead focus exclusively on the smaller set of outlets that people rely on for local news. Excluding those national sources thus leaves us with a smaller set of 'market participants' that we regulate to protect local news diversity in a way that might be unnecessary to protect diversity among national news sources. Third, we do not include low power television and low power radio stations in measuring viewpoint diversity. These stations are often operated with the express purpose of serving niche audiences with ethnic or political content that larger media outlets do not address. These low power outlets promote viewpoint diversity in a way that we have not addressed because of their more limited reach, but collectively they enhance viewpoint diversity beyond the levels that are reflected in our Diversity Index measurements.

400. We conclude that each of these judgments that inform our viewpoint diversity analysis are sound, but in each case we make the most conservative assumption possible. Thus, the results of our diversity index analysis can fairly be said to understate the true level of viewpoint diversity in any given market.

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[901] Fox Comments at 59.

[902] MOWG Study No. 3 at 80.